



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

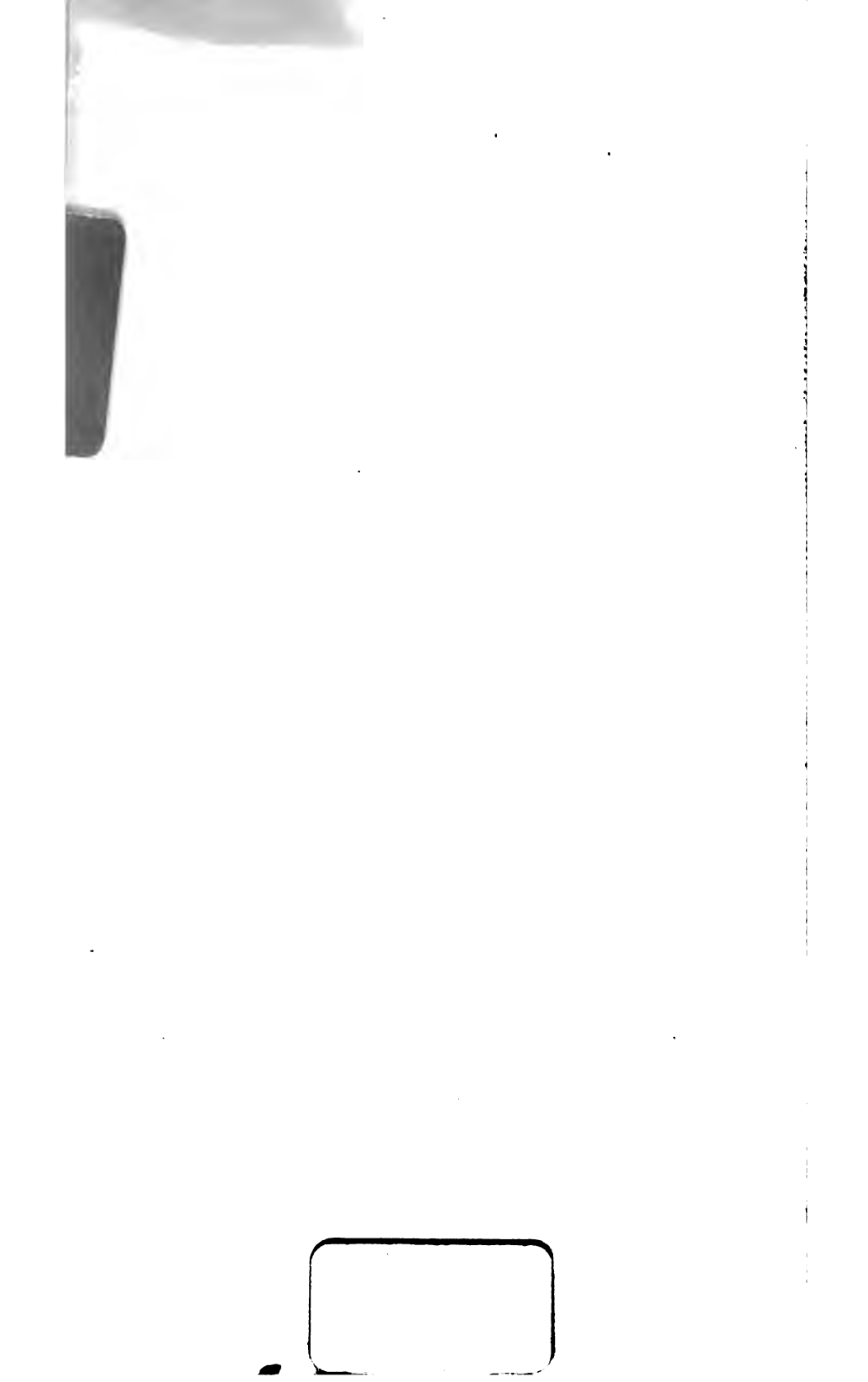
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

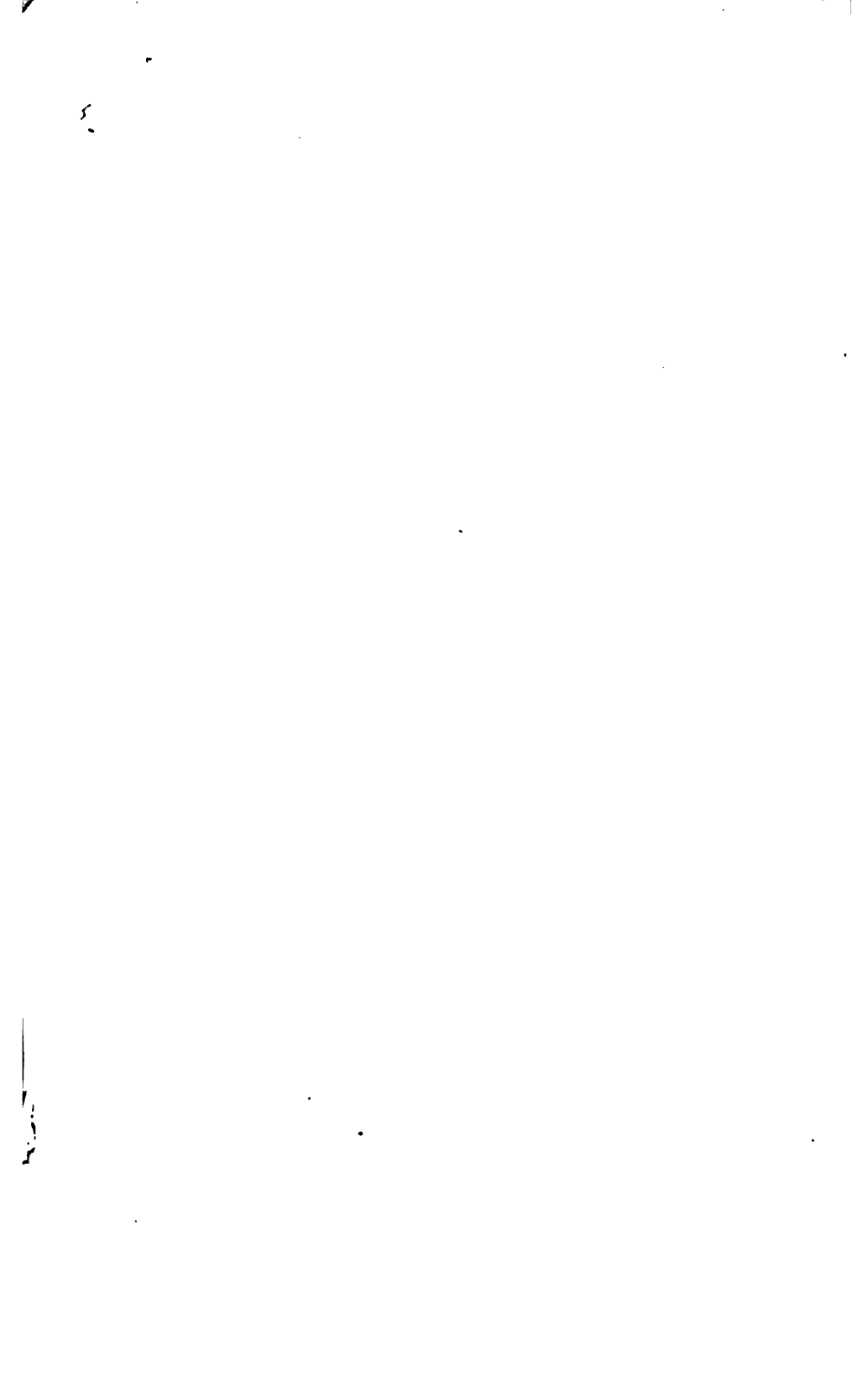
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



JSN
JAB
DAT
v.5





REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,

AND

**JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,
ESQRS. BARRISTERS AT LAW.**

VOL. V.

Containing the Cases of TRINITY, MICHAELMAS, and HILARY Terms,
in the 3d & 4th Years of WILLIAM IV. 1833-4.

LONDON:

PRINTED FOR SAUNDERS AND BENNING,

(SUCCESSORS TO J. BUTTERWORTH AND SON,)

43. FLEET-STREET.

1835.

HOZAR ...

...

...
LIBRARY OF THE
LELAND, STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

Q-55042

JUN 26 1907

LONDON:
Printed by A. SROTTSWOODS,
New-Street-Square.

J U D G E S
OF THE
C O U R T O F K I N G ' S B E N C H

During the Period of these REPORTS.

Sir THOMAS DENMAN, Knt., C. J.

Sir JOSEPH LITTLEDALE, Knt.

Sir JAMES PARKE, Knt.

Sir WILLIAM ELIAS TAUNTON, Knt.

Sir JOHN PATTESON, Knt.

ATTORNEY-GENERAL.

Sir WILLIAM HORNE, Knt.

SOLICITOR-GENERAL.

Sir JOHN CAMPBELL, Knt.

THE HISTORY OF THE

REPUBLIC OF THE UNITED STATES

| | | |
|------|---------------|--|
| Page | | |
| 101 | Black & White | |
| 102 | Black & White | |
| 103 | Black & White | |
| 104 | Black & White | |
| 105 | Black & White | |
| 106 | Black & White | |
| 107 | Black & White | |
| 108 | Black & White | |
| 109 | Black & White | |
| 110 | Black & White | |
| 111 | Black & White | |
| 112 | Black & White | |
| 113 | Black & White | |
| 114 | Black & White | |
| 115 | Black & White | |
| 116 | Black & White | |
| 117 | Black & White | |
| 118 | Black & White | |
| 119 | Black & White | |
| 120 | Black & White | |
| 121 | Black & White | |
| 122 | Black & White | |
| 123 | Black & White | |
| 124 | Black & White | |
| 125 | Black & White | |
| 126 | Black & White | |
| 127 | Black & White | |
| 128 | Black & White | |
| 129 | Black & White | |
| 130 | Black & White | |
| 131 | Black & White | |
| 132 | Black & White | |
| 133 | Black & White | |
| 134 | Black & White | |
| 135 | Black & White | |
| 136 | Black & White | |
| 137 | Black & White | |
| 138 | Black & White | |
| 139 | Black & White | |
| 140 | Black & White | |
| 141 | Black & White | |
| 142 | Black & White | |
| 143 | Black & White | |
| 144 | Black & White | |
| 145 | Black & White | |
| 146 | Black & White | |
| 147 | Black & White | |
| 148 | Black & White | |
| 149 | Black & White | |
| 150 | Black & White | |
| 151 | Black & White | |
| 152 | Black & White | |
| 153 | Black & White | |
| 154 | Black & White | |
| 155 | Black & White | |
| 156 | Black & White | |
| 157 | Black & White | |
| 158 | Black & White | |
| 159 | Black & White | |
| 160 | Black & White | |
| 161 | Black & White | |
| 162 | Black & White | |
| 163 | Black & White | |
| 164 | Black & White | |
| 165 | Black & White | |
| 166 | Black & White | |
| 167 | Black & White | |
| 168 | Black & White | |
| 169 | Black & White | |
| 170 | Black & White | |
| 171 | Black & White | |
| 172 | Black & White | |
| 173 | Black & White | |
| 174 | Black & White | |
| 175 | Black & White | |
| 176 | Black & White | |
| 177 | Black & White | |
| 178 | Black & White | |
| 179 | Black & White | |
| 180 | Black & White | |
| 181 | Black & White | |
| 182 | Black & White | |
| 183 | Black & White | |
| 184 | Black & White | |
| 185 | Black & White | |
| 186 | Black & White | |
| 187 | Black & White | |
| 188 | Black & White | |
| 189 | Black & White | |
| 190 | Black & White | |
| 191 | Black & White | |
| 192 | Black & White | |
| 193 | Black & White | |
| 194 | Black & White | |
| 195 | Black & White | |
| 196 | Black & White | |
| 197 | Black & White | |
| 198 | Black & White | |
| 199 | Black & White | |
| 200 | Black & White | |

A

TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

| | | Page | |
|---------------------------------------|------|------------------------------------------|-----------|
| | | | |
| A | | | |
| | | | |
| ALLEN, Rex v. | 984 | Beswick v. Swindells | 914 |
| | 1088 | Bezant, Field v. | 357 |
| Anonymous | | Bird, Doe d. Smith v. | 695 |
| | | — Tunno v. | 488 |
| B | | Bishop Wearmouth, Inhabitants of, Rex v. | 942 |
| | | Blaney v. Holt and Fardell | 241 |
| Bailiffs of Godmanchester v. Phillips | 198 | Bodfield v. Padmore | 1095 |
| Backhouse v. Harrison | 1098 | Bond, Sims v. | 359 |
| Bake and Another, Freeman v. | 797 | Bottriell, Doe d. Tunstill v. | 131 |
| Banbury, Inhabitants of, Rex v. | 176 | Brett, Siggers v. | 455 |
| Banister, Kirby v. | 1070 | Brook, Tardrew v. | 880 |
| Barras, Graham v. | 1011 | Brooker v. Wood | 1052 |
| Batt, Howell v. | 504 | Brown v. Dean | 848 |
| Beaufort, Duke of, Rex v. | 442 | Brundrett, Morgan v. | 289 |
| Beaumont, Coombs and Another v. | 72 | Buckingham, Inhabitants of, Rex v. | 953 |
| Beckford, Domett v. | 521 | Burgess, Mayor of Leicestershire v. | 246 |
| Bedwardine, Inhabitants of, Rex v. | 169 | Burlington, Earl of, Doe d. Grubb v. | 507 |
| | | Butler, Cheetham and Wife v. | 837 |
| | | A 3 | Campbell, |

TABLE OF CASES REPORTED.

| | | Page | | Page |
|-------------------------------|------|------|--------------------------|------|
| C | | | Doe d. Smith v. Bird and | |
| | | | Another | 695 |
| Campbell, Macarthur v. | 518 | | — Tunstall v. Bottriell | 131 |
| — v. Rickards and | | | — Grubb v. Burlington, | |
| Others | 840 | | Earl of | 507 |
| Carr v. Roberts | 78 | | — Prichard and Others | |
| Carstairs, Rickman v. | 651 | | v. Dodd | 689 |
| Cash, Fawcett v. | 904 | | — Marriott v. Edwards | 1065 |
| Chamberlain, Child v. | 1049 | | — Gallini v. Gallini | 621 |
| Cheetham and Wife v. | | | — Smith v. Galloway | 49 |
| Butler | 887 | | — Gwillim v. Gwillim | 122 |
| Chelsea Water Works | | | — Langdon v. Langdon | 864 |
| Company, Rex v. | 156 | | — Williams v. Matthews | 298 |
| Cheshire, Justices of, Rex v. | 439 | | — Knight v. Nepean | 86 |
| Cheshunt Turnpike Roads, | | | — Griffith and Others v. | |
| Trustees of, Rex v. | 438 | | Pritchard | 765 |
| Child v. Chamberlain | 1049 | | — Langdon v. Reed | 864 |
| Clements v. Langley | 872 | | — Standish v. Roe | 878 |
| Clutterbuck v. Combes | 400 | | — Rogers v. Rogers | 755 |
| Cottle v. Warrington | 447 | | — Pilkington v. Spratt | 731 |
| Combes, Clutterbuck v. | 400 | | — Reed v. Taylor | 575 |
| Coombs and Another | | | — Leach v. Whitaker | 409 |
| signee v. Beaumont | 72 | | — Jones v. Williams | 788 |
| Coomes, Pitt v. | 1079 | | Donnett v. Beckford | 821 |
| Crook v. Jadis | 909 | | Drake, Souter v. | 992 |
| Culley, In the Matter of | 230 | | Dyer, Dawson v. | 584 |

D

| | |
|---------------------------|-----|
| Davenport, Stow v. | 359 |
| Davies, Griffith v. | 502 |
| —, Nowell v. | 368 |
| Davis and Another, Rex v. | 551 |
| Dawson v. Dyer | 584 |
| Day, Robinson v. | 814 |
| Dean, Brown v. | 848 |
| Devon, Inhabitants of the | |
| County of, Rex v. | 383 |
| Dewhurst, Rex v. | 405 |
| Dickons, Reid v. | 499 |
| Dilly, Ford v. | 885 |
| Dixon v. Yates | 313 |
| Dodd, Doe d. Pritchard | |
| and Others v. | 689 |

E

| | |
|----------------------------|------|
| Edwards, Doe d. Marriott | |
| v. | 1065 |
| —, Rex v. | 407 |
| Edwards v. Vere | 282 |
| Engleheart v. Eyre and An- | |
| other | 68 |
| Eyre and Another, Engle- | |
| heart v. | 68 |

F

| | |
|----------------------|------|
| Faithfull, Warman v. | 1042 |
| Fardell, Blaney v. | 241 |
| Fawcett v. Cash | 904 |
| Fearnley, | |

TABLE OF CASES REPORTED:

vii

| | Page | | Page |
|-----------------------------|------|-----------------------------|------|
| Fearnley, Leeming and, In | | Hill and Others, Mason v. | 1 |
| the Matter of | 403 | Hillary v. Rowles and two | |
| Field v. Bezanet | 357 | Others | 420 |
| Finnie v. Montague | 877 | Hincksey Turnpike Roads, | |
| Ford v. Dilly | 885 | Rex v. | 439 |
| Foreman v. Jeyes | 835 | Holden and Another, Rex | |
| Forster v. Taylor | 887 | v. | 347 |
| Freeman v. Baker and An- | | Holt and Fardell, Blaney v. | 241 |
| other | 797 | Horton, Hare v. | 715 |
| Frieston, Inhabitants of, | | Hopwood v. Watts | 1055 |
| Rex v. | 597 | Howell v. Batt | 304 |
| | | Hunt v. Massey | 902 |
| G | | | |
| Gallini, Doe d. Gallin v. | 621 | Jadis, Crook v. | 369 |
| Galloway, Doe d. Smith v. | 43 | James, Plant v. | 791 |
| Gibbs v. Southam | 911 | — v. Thomas and An- | |
| Gibson v. Winter | 96 | other | 40 |
| Godmanchester, Bailiffs of, | | Jarrett v. Williams | 1109 |
| v. Phillips | 198 | —, Williams v. | 82 |
| Goss v. Lord Nugent | 58 | Jefferson, Rex v. | 255 |
| Graham v. Barras | 1011 | Jenkins, Mitchell v. | 588 |
| Grant, Rex v. | 1062 | Jesse, Sweetapple v. | 27 |
| Graves v. Weld | 105 | Jeyes, Foreman v. | 835 |
| Great Glenn, Inhabitants | | | |
| of, Rex v. | 188 | K | |
| Gregory, Rex v. | 555 | Kelly v. Partington | 645 |
| Griffith v. Davies | 502 | Kensington Canal Com- | |
| Gwillim, Doe d. Gwillim v. | 122 | pany, Lord Oakley v. | 138 |
| H | | | |
| Hare v. Horton | 715 | Kirby v. Banister | 1070 |
| Harrison, Backhouse v. | 1098 | Kirke, Rex v. | 1098 |
| Harrison and Another, As- | | | |
| signees, v. Wardle and | | L | |
| Others | 146 | Lady Jane St. John Mild- | |
| Hayes v. Trotter | 1106 | may, Rex v. | 254 |
| Helps, Taylor v. | 1069 | Langley, Clements v. | 372 |
| Heming, Rex v. | 666 | Langworthy, Pope v. | 464 |
| Hill v. The Manchester and | | Leake, Inhabitants of, Rex | |
| Salford Water Works | | v. | 469 |
| Company | 866 | Leeming | |

TABLE OF CASES REPORTED.

ix

| | Page | | Page |
|-------------------------------------------|------|------------------------------------------------|----------|
| Reid v. Dickons | 499 | Rex v. Mayor and Aldermen of London | 233 |
| Renton, Simpson v. | 35 | — Middlesex, Justices of, In Re Bowman | 113 |
| Rex v. Allen, Gent. | 984 | — v. Norfolk, Justices of | 990 |
| — v. Banbury, Inhabitants of | 176 | — v. North Leach and Witney Roads, Trustees of | 978 |
| — v. Beaufort, Duke of | 442 | — v. Oulton, Inhabitants of | 958 |
| — v. Bedwardine, Inhabitants of | 169 | — v. Pitt | 365 |
| — v. Bishop Wearmouth, Inhabitants of | 942 | — v. Preston, Inhabitants of | 1028 |
| — v. Buckingham, Inhabitants of | 953 | — v. Ruthin, Inhabitants of | 215 |
| — v. Chelsea Water Works Company | 156 | — v. Rye, Commissioners of the Harbour of | 1034 |
| — v. Cheshire, Justices of | 439 | — v. St. Cuthbert Wells, Inhabitants of | 139 |
| — v. Cheshunt Turnpike Roads, Trustees of | 438 | — v. St. George Hanover Square, Inhabitants of | 571 |
| — v. Churchbume, Inhabitants of | 1029 | — v. St. John Bedwardine, Inhabitants of | 169 |
| — v. Davis and Another | 551 | — v. St. Katherine, Parish of | 270 |
| — v. Devon, Inhabitants of the County of | 383 | — v. St. Mary Colches-ter, Inhabitants of | 1023 |
| — v. Dewhurst | 405 | — v. St. Mary Newington, Inhabitants of | 540 |
| — v. Edwards | 407 | — v. St. Nicholas Rochester, Inhabitants of | 219 |
| — v. Frieston, Inhabitants of | 597 | — v. Stockton, Inhabitants of | 546 |
| — v. Grant | 1082 | — v. Sutton | 52 |
| — v. Great Glenn, Inhabitants of | 188 | — v. Tregarthen | 678 |
| — v. Great Wakering, Inhabitants of | 971 | — v. Wakering Great, Inhabitants of | 971 |
| — v. Gregory | 555 | — v. West Riding of Yorkshire, Justices of | 667 |
| — v. Heming | 666 | | 1003 |
| — v. Hincksey Turnpike Roads | 439 | — v. Wick St. Lawrence, Inhabitants of | 526 |
| — v. Holden and Another | 347 | Rickards and Others, Campbell v. | 840 |
| — v. Jefferson | 855 | Rickman v. Carstairs | 651 |
| — v. Kirke | 1089 | | Ripping- |
| — v. Lady Jane St. John Mildmay | 254 | | |
| — v. Leake, Inhabitants of | 469 | | |
| — v. Lubbenham, Inhabitants of | 968 | | |
| — v. Matlock, Inhabitants of | 883 | | |

TABLE OF CASES REPORTED.

[illegible]

TABLE OF CASES REPORTED.

xi

| | Page | | Page |
|--------------------------------------------------|------|----------------------------|------|
| West Riding of Yorkshire, Justices of, Rex v. | 667 | Wood, Brooker v. | 1082 |
| | 1003 | Wrigley v. Smith | 1147 |
| Westzinthus and Others, In the Matter of | 817 | | Y |
| Whitaker, Doe d. Leach v. | 409 | | |
| Wick St. Lawrence, The Inhabitants of, Rex v. | 526 | Yardley, Tessimond v. | 458 |
| Williams v. Jarrett | 82 | Yates, Dixon v. | 313 |
| _____, Doe d. Jones v. | 783 | Yorke, Tibbits v. | 605 |
| _____, James v. | 1109 | Yorkshire, Justices of the | |
| Winter, Gibson v. | 96 | West Riding of, Rex v. | 667 |
| | | | 1003 |

ERRATA.

Page 91. line 29. after (*e*) insert a comma, and for "*in*" read "*In*."

92. note (c) line 2. for "which" read "it."

122. line 4. for "*Henry*" read "*Joseph*."

170. line 11. for "*Legh*" read "*Lee*."

255. In the margin, for "*Lady*" read "*Dame*." Same correction throughout the case.

259. lines 96, 97. make the stops as follows:—"surrenderer, *Vaughan v. Atkins* (c):"

326. line 27. after (*g*), a comma instead of a full stop.

508. line 24. for "no" read "an."

537. line 1. omit "C."

632. line 18. for "*Lady Gallini*" read "*Lady Betty Gallini*."

647. line 24. for "discharged" read "absolute."

vii. line 6. from bottom, for "bellers" read "ballers."

C A S E S

ARGUED AND DETERMINED

1833.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Third Year of the Reign of WILLIAM IV. (a)

MASON *against* HILL and Others.

CASE. The first count of the declaration stated, *A. erected a mill in 1825 on his own land, the former owner of which had for twenty years before 1818 appro-*
that before and at the time, &c. the plaintiff was
lawfully possessed of a certain mill, manufactory, hereditaments,

riated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818 *B.* had erected a mill near the same stream, and the owner and occupier of *A.*'s land then gave a parol licence to *B.* to make a dam at a particular spot, and take what water he pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where *A.*'s mill was afterwards erected. In 1818 *B.*, without licence, conveyed part of the water which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828 *A.* appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829 *A.* demolished the dam erected by *B.*, and gave him notice not to divert the water. *B.* then erected a new dam lower down the stream, and by means of it diverted from *A.*'s mills, at some times, all the water before appropriated by *A.*, at others a part of it, and the water, when returned into the stream, was in a heated state: Held, on special verdict,

First, that whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, *A.* was entitled to the surplus water, for he was first occupant of that, and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water.

(a) *Trenton J.* sat in the Bail Court this term.

VOL. V.

B

Secondly,

1823.

Maab's
against
Maab.

Secondly, that *A.* was in like manner entitled to recover in respect of the water diverted by *B.* at his new dam; because the licence granted to *B.* by the former occupier was to take the water at one particular point, and not at the place where this dam was made; and, further, because if the licence had been general to take at any place, it would have been revocable, except as to such places where it had been acted on and expense incurred; and it was revoked before the last dam was erected;

Thirdly, that *A.* was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1618: for the possessor of land through which a natural stream flows, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment.

Whether such possessor of land can maintain an action for the mere violation of such general right, by diversion of the water, &c., without having sustained any special injury, *Quære.*

ditaments, close, and premises, with the appurtenances, in the county of *Stafford*; and by reason thereof, of right ought to have had and enjoyed the benefit and advantage of the water of a certain stream which had been used to run and flow, and during all that time ought to have run and flowed, in great plenty and parity, and still of right ought so to run and flow unto the said mill, &c. of the plaintiff, to supply the same with water for working, using, and enjoying the same respectively and for other necessary purposes; yet the defendants contriving, &c. by a certain dam and divers obstructions, placed in and across the said stream above the plaintiff's premises, impounded, penned back, and stopped the water of the said stream, and also wrongfully and injuriously laid down into and near the said stream, above the plaintiff's premises, divers pipes and tiles; and kept and continued the said dam and obstructions so placed in and across the said stream, and the said pipes and tiles so laid down for a long space of time, to wit, hitherto; and thereby during all that time unlawfully and wrongfully diverted and turned divers large quantities of the water of the said stream, which ought to have flowed to the said mill, &c. respectively, away from the said mill, &c., and stopped and prevented the same from flowing along the usual and proper course to the said premises. And also that the defendants wrongfully and injuriously heated and spoiled the water which ran and flowed unto the said mill, &c.,

so that it became of no use to the plaintiff, whereby he was prevented from using his mill, &c., in so extensive and beneficial a manner as he otherwise would have done. In the second count the plaintiff stated himself to be possessed of a close and lands, with the appurtenances, and of a mill and manufactory situate therein, near to the said stream, and claimed a right to have the stream run to the said close and premises for supplying the same with water for the necessary purposes thereof. In the third count a similar right was claimed for the convenient enjoyment of certain hereditaments, lands, and premises, with the appurtenances. There was a fourth count for turning foul water upon the plaintiff's premises. Plea, not guilty. At the *Stafford Spring* assizes, 1831, the jury found a special verdict, stating the following facts:—

A stream of water called the *Stubbs Brook*, from time whereof, &c., until the diversions thereof as after mentioned, had been used and accustomed to run and flow by the northern end of the town of *Newcastle-under-Lyme*, in a southerly direction, by the corner of a garden called *Kinnersley's Garden*, and into and through a certain croft called *Hatwell's Croft*, by a tree there called the *Sitchwell Tree*, and from thence into a piece of land called the *Parson's Flat*, by a spring there called the *Sitchwell Spring*, and from thence by and through certain other closes into a croft called *Ashley's Croft*, part of which croft at the times when, &c. belonged and now belongs to the defendants, and other part of the croft at the time when, &c. belonged and now belongs to the plaintiff, and in which part last aforesaid the engine, mill, manufactory, hereditaments, and premises of the plaintiff, in the declaration and

1833.

Massie
against
Hunt.

1833.

 MASON
 against
 HILL.

hereinafter mentioned, then were and are now situate, but the stream ran and flowed only through that part of the said croft which now belongs to the plaintiff, and from thence through a certain other close into the *Newcastle Lower Canal*. During all the time aforesaid, a considerable quantity of pure water at all times ran and flowed from the *Sitchwell Spring*, and also from other springs, called the *Over Canal Springs*, into the said stream; which last-mentioned springs flowed into the stream below the *Sitchwell Spring*; and the stream before the diversions thereof as hereinafter mentioned, ran and flowed down and along its natural and ancient course to, through, and along *Ashley's Croft*.

For upwards of twenty years before 1818, *Thomas Ashley* the father, who was then the occupier and owner of the whole of *Ashley's Croft*, had appropriated and used the water of the said stream and springs for watering his cattle, and also for irrigating that part of the said croft which now belongs to the plaintiff. In 1818, the defendants erected a mill and manufactory in a certain close adjoining *Ashley's Croft*, near, but not contiguous, to the said stream; and at that time *Thomas Ashley*, the son, who was then the occupier and owner of the whole of *Ashley's Croft*, gave to the defendants a parol licence to make a dam at the said tree, called *Sitchwell Tree*, higher up the said stream than the *Sitchwell Spring* and the *Over Canal Springs*, and to take what water of the stream they pleased from that point to the mill and manufactory of the defendants; which water, after being used at that mill, was to be returned by pipes into the bed or channel of the said stream, higher up than that part of *Ashley's Croft* which now belongs to the plaintiff. In consequence of such parol licence,

licence, the defendants did, in 1818, erect such dam, and thereby take part of the water of the stream above the *Sitchwell Spring* and the *Over Canal Springs*, for the use of their mill and manufactory, by the means of pipes, laid down at their own expense to a large amount; and for a considerable time returned part of such water back again by means of other pipes, into the stream, bed, or channel of the stream between the *Sitchwell Spring* and that part of *Ashley's Croft* which now belongs to the plaintiff. Also in 1818 the defendants collected into a tank part of the water of the *Over Canal Springs*; and, by means of pipes, carried the same over the brook into a reservoir, which received the water taken under the licence from the *Sitchwell Tree*; but such licence did not extend to take such last mentioned water from the *Over Canal Springs*.

1833.

MASON
against
HILL.

After the said dam was made, part of the water of the stream which from time to time flowed over and through the dam, and also all the water from the *Sitchwell Spring*, and after the making the tank part of the water from the *Over Canal Springs* not collected in the said tank, ran and flowed at all times in its ancient and natural course towards, into, through, and along the *Ashley's Croft*, and until the diversion thereof by the defendants as hereinafter next mentioned.

The parol licence so given by *Thomas Ashley* the son to the defendants, to make the dam at the *Sitchwell Tree*, did not extend to empower them to take the water from the *Sitchwell Spring*.

In 1823, the plaintiff erected and made the manufactory and premises in the declaration mentioned, upon that part of *Ashley's Croft* which belongs to the plaintiff, by the side of the stream, and the plaintiff, by the leave

1833.

Mason
vs. Hill.

and licence of the defendants, laid down pipes between his mill and that of the defendants, and took the hot water which came from the engine and mill of the said defendants unto and into his the plaintiff's manufactory for the purposes thereof, until *February* 1829, when the communication by means of the pipes was cut off by the plaintiff, and at that time and until the diversion thereof by the defendants as hereinafter next mentioned, the plaintiff appropriated and used part of the water of the stream which flowed over and through the dam so made at the *Sitchwell Tree*, and also the whole of the water which flowed from the *Sitchwell Spring*, and also from such part of the *Over Canal Springs* as were not taken into the tank, and also all the water which was returned by the pipes of the defendants into the stream, for the purposes of his mill and manufactory.

In *October* 1828, the plaintiff erected a steam-engine and mill for the purposes of his manufactory, and at that time, and until the diversion thereof by the defendants as next mentioned, appropriated and used part of the water of the stream which flowed over and through the dam so made at the *Sitchwell Tree*, and also the whole of the water which flowed from the *Sitchwell Spring*, and from such part of the *Over Canal Springs* as was not taken into the tank, and also the water which was returned by the pipes of the defendants into the stream, for the purposes of his said steam-engine, mill, and manufactory.

There is a ridge of land between the stream and the defendants' mill, manufactory, and premises, which, in the highest part, is thirteen feet, and in the lowest part, nine feet above the level of the mill of the defendants, and which would prevent the water of the stream from flowing in its natural course to the mill, manufactory,
and

and premises of the defendants. The plaintiff's mill is eleven feet below the level of the defendant's mill.

In *January* 1829, the plaintiff destroyed the dam made by the defendants at the *Sitchwell Tree*, which the defendants re-erected, and which the plaintiff again destroyed, in order that the water might run along its ancient and natural course; and on the 18th of *February* then next, the plaintiff gave notice to the defendants not to divert or turn the water of the stream from its ancient and natural channel.

In *June* 1829, the defendants erected and made another dam in and across the stream, lower down the stream than the place where the *Sitchwell Spring*, and such part of the *Over Canal Springs* as were not taken into the said tank, flow into the stream, by means of which last mentioned dam, all the water of the stream, and also all the water of the *Sitchwell Spring*, and such part of the *Over Canal Springs* as aforesaid, was diverted from its ancient and natural course, and was prevented from flowing along the same to the said mill, engine, manufactory, and premises of the plaintiff.

On certain days, to wit, twenty days, between the making of the last mentioned dam and the commencement of the within suit, all the water was taken by the defendants by means of the last mentioned dam from the stream, and the *Sitchwell Spring*, and such part of the *Over Canal Springs* as aforesaid, and no water was on those days returned by the defendants into the bed or channel of the stream; but the water from the stream and the *Sitchwell Spring*, and such part of the *Over Canal Springs* as aforesaid, was on those days diverted by the defendants into a totally different direction down a certain street called *Penkhill Street*.

1833.

 MASON
 against
 HILL.

Although, on other days, since the last mentioned dam was made, some water was returned by the defendants into the stream between the last mentioned dam and the said engine, mill, and manufactory of the plaintiff; yet, from day to day, as much water was not returned by the defendants into the stream as was taken from it by them, and the water which was returned by the defendants on such last mentioned days came back in a heated state.

The last-mentioned dam so erected by the defendants in June 1829, stopped, diverted, and turned more water than the dam so made by them as aforesaid at the *Sitchwell Tree* in 1818 by the licence of *Thomas Ashley*.

After the dam at the *Sitchwell Tree* had been knocked down by the plaintiff, the defendants might have put it up again in the same place, and they were not prevented from so doing by the acts of the plaintiff; and upon some occasions before the erection of the plaintiff's engine, the plaintiff misconducted himself by throwing or penning back hot water upon the defendant's mill, from the pipes by which the hot water was carried from the mill of the defendants to the mill of the plaintiff. The special verdict then stated that by means of the premises the plaintiff was prevented from enjoying his mill and manufactory, and premises, and from carrying on his business, &c. in manner and form in the said declaration mentioned.

If it should appear to the Court on the whole matter that the defendants were guilty, the jurors in that case assessed the damages of the plaintiff, by reason of the defendants having hindered and prevented so much of the water of the said stream as was formerly taken by the defendants under the said parol licence, by means of the dam at the *Sitchwell Tree*, from running and flowing down

and premises of the defendants. The plaintiff's mill is eleven feet below the level of the defendant's mill.

In *January* 1829, the plaintiff destroyed the dam made by the defendants at the *Sitchwell Tree*, which the defendants re-erected, and which the plaintiff again destroyed, in order that the water might run along its ancient and natural course; and on the 18th of *February* then next, the plaintiff gave notice to the defendants not to divert or turn the water of the stream from its ancient and natural channel.

In *June* 1829, the defendants erected and made another dam in and across the stream, lower down the stream than the place where the *Sitchwell Spring*, and such part of the *Over Canal Springs* as were not taken into the said tank, flow into the stream, by means of which last mentioned dam, all the water of the stream, and also all the water of the *Sitchwell Spring*, and such part of the *Over Canal Springs* as aforesaid, was diverted from its ancient and natural course, and was prevented from flowing along the same to the said mill, engine, manufactory, and premises of the plaintiff.

On certain days, to wit, twenty days, between the making of the last mentioned dam and the commencement of the within suit, all the water was taken by the defendants by means of the last mentioned dam from the stream, and the *Sitchwell Spring*, and such part of the *Over Canal Springs* as aforesaid, and no water was on those days returned by the defendants into the bed or channel of the stream; but the water from the stream and the *Sitchwell Spring*, and such part of the *Over Canal Springs* as aforesaid, was on those days diverted by the defendants into a totally different direction down a certain street called *Penkhull Street*.

1833.

MASON
against
HILL.

an action against the party so diverting it; and that it was no answer to the action, that the defendants first appropriated the water to their own use, unless they had had twenty years' undisturbed enjoyment of it in the altered course. All the authorities were there cited and commented on. Assuming even that that decision was wrong, and that the right to water is, as the defendants say, acquired by occupancy, yet the plaintiff is entitled to recover, because it is here found that twenty years before the erection of the defendants' mill, the former owner and occupier of the plaintiff's land had appropriated and used the water of the stream and springs for watering his cattle, and for irrigating the land now belonging to the plaintiff. It will be said that the defendants were authorised by the parol licence to take part of the water. But that licence was revocable, and it was revoked by the plaintiff's destroying the dam in 1829. And even if that were not so, the licence being to make a dam, and thereby take water from a particular spot, was an easement, and could be granted only by deed: *Hewlins v. Shippam* (a), *Bryan v. Whistler* (b). In *Winter v. Brockwell* (c), and *Liggins v. Inge* (d), licence was held irrevocable, but there the thing to be done was on the land of the licensee. That distinction was taken in *Hewlins v. Shippam*. Besides, the licence here could not apply to a dam erected in a new place.

Peake Serjt. contra. The principal question is, whether the right to the use of flowing water can be acquired by the owner of adjoining land unless it has been enjoyed

(a) 5 B. & C. 221.

(b) 8 B. & C. 288.

(c) 7 8 East, 308.

(d) 7 Bingham, 682.

for twenty years. The former decision in this case proceeded principally on the authority of *Wright v. Howard* (a), but there the authorities upon the subject were not cited. The dicta of Lord Hale in *Cox v. Matthews* (b), and of Le Blanc J. in *Bealey v. Shaw* (c), recognised by Holroyd J. in *Saunders v. Newman* (d); and those of Bayley J. in *Williams v. Morland* (e), and Canham v. Fisk (g), shew that the right to flowing water is acquired by appropriation or occupancy. It was said upon the former argument in this case, that flowing water, like light and air, is publici juris. If that be so, it cannot belong to the owner of the land adjoining its channel, until it is appropriated. Mr. Justice Blackstone in his *Commentaries*, vol. 2. pp. 14. and 18., states water to be one of those things the property in which is acquired by occupancy. But assuming even that the proprietor of lands contiguous to a stream is prima facie entitled to the use of all the water which comes to his land, still here the former owner of the plaintiff's land having given a licence to the defendants to make a dam near the *Sitchwell Tree*, and to take what water they pleased from that point, it was not competent for him, or the plaintiff who claimed under him, to revoke that licence: *Taylor v. Waters* (h). *Liggins v. Inge* (i) is an express authority to shew that a parol licence (executed), to take water, is irrevocable. It may be conceded, that according to the authorities cited, a party cannot by parol take an

1838.

MASON
against
HILL

(a) 1 Sim. & St. 180.

(c) 6 East, 208.

(e) 2 B. & C. 913.

(h) 7 Tamm. 374.

(b) 1 Vent. 237.

(d) 1 B. & A. 258.

(g) 2 Tyrwh. 155. 2 Cro. & J. 126.

(i) 7 Bingh. 682.

1823.

Mason
against
Hill.

estate in the land of another, but a party may by parcel licence acquire a right to the use of water, though not a right to have a passage for water over another's land, as in *Hewlins v. Shippam* (a).

Then this action is not maintainable by reason of the defendants' having accidentally taken more water than they were entitled to. The defendants were possessed of the right to take water either by licence or appropriation. The plaintiff then destroyed the defendants' dam, which they tried to restore, but, the plaintiff not suffering them quietly to enjoy his right, they made another dam on their own land, below the *Sitwell Spring*, and thereby took at certain times more water than he was entitled to. But as that arose from the plaintiff's own misconduct, he cannot bring an action on the case for it, for a party who brings case must have justice on his side: *Bird v. Randall* (b). In *Comyn's Dig. Action on the Case*, (B) 4. It is said that it does not lie where the damage happens by the default or negligence of the plaintiff himself. As to the appropriation by *Ashley*, he merely acquired a right to the water for the purpose of irrigating his land and watering his cattle, but the plaintiff claims a right to have the water for the use of his mill.

Cur. adv. vult.

DENMAN C. J., in this term, delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows:—

The substance of the special verdict is this:—The defendants' mill was erected in 1818; the plaintiff's in

(a) 5 B. & C. 221.

(b) 3 Burr. 1545.

1823, on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land.

1823.

~~1823.~~

Mason

against

Mason.

1823.

At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parcel licence to the defendants to make a dam, at a particular place above, where the *Sidwell Tree* stood, and to take what water they pleased from that point to their mill, which water was so taken, and returned by pipes into the stream, above the spot where the plaintiff's mill was afterwards erected.

In 1818 the defendants conducted part of the water of the *Over Canal Springs*, which had before flowed into the stream, into a reservoir for the use of their mill.

After the plaintiff erected his mill, namely, in 1823, he appropriated to his use all the surplus water, viz. that which flowed over and through the dam; that from the *Over Canal Springs*, which was not conducted into the reservoir; and all from the *Sidwell Spring* (which was another faden of the brook), and also that which was returned by the defendants into the stream.

In January 1828 the plaintiff demolished the dam at the *Sidwell Spring*. The defendants erected a new dam lower down, and by means of it diverted from the plaintiff's mill, at some times, *all* the stream, including all the water so appropriated; at others, a part of it, and returned the remainder in a heated state into the stream.

And the questions upon this special verdict are,—

Whether the plaintiff is entitled to recover, for the diversion of the whole water of the stream, or of any
and

1888.

~~Mason~~
~~against~~
~~Mason.~~

and what part of it, or for the heating of the part returned?

That the plaintiff has a right to a verdict for the injury sustained by the abstraction of *the whole of the surplus water*, and by the abstraction of part, and the heating of the remainder, of that surplus water, does not admit of the least doubt. In any view of the law on this subject,—whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side,—the plaintiff was entitled to this surplus, for he filled both characters; he was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey v. Shaw (a)*.

The learned counsel for the defendants argued, that inasmuch as the plaintiff pulled down the dam at the *Sickwell Tree*, in consequence of which the new dam was erected, he must be considered as the author of the mischief, and has no right to complain of it. It is, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it, or brought an action; they had no right to construct another at a different place, and by means of it abstract more water than the other did.

The remaining questions are, whether the plaintiff can recover, in respect of the abstracting, or the injury by heating, of that portion of water which was before

(a) 6 East, 208.

diverted by the licence of the then owner and occupier of the plaintiff's field; and, secondly, in respect of that portion of the *Over Canal Springs* which was conveyed in 1818 to the defendants' reservoir, both of which portions have been at one time entirely, and at another partially abstracted, and in the latter case returned in a heated state into the brook: and we are of opinion that the plaintiff is entitled to recover in respect of both.

As to the first of these portions, the defendants contend that the plaintiff has no right of action, because the former owner and occupier of his land gave an irrevocable licence by parol to the defendants to divert so much water by the *Sitchwell Tree Dam*, and to prove that a parol licence to divert water, which had been acted upon by the person to whom it was given, and expense occurred in consequence, is irrevocable, the case of *Liggins v. Inge* (a) was cited. But, admitting that the licence to abstract the water at that particular point, and by means of that dam, was irrevocable, and therefore that the plaintiff was a wrongdoer in pulling the dam down, it by no means follows that the plaintiff is not to recover for an equal portion of water abstracted at a different place. In the first place, the licence is not general, to take away at any point, but at this only; and in the second place, if the licence had been general, to take away at any place, it would have been clearly revocable, except as to such places where it had been acted upon, and expense incurred (for it is on that ground only that such a licence can be irrevocable); and as it was revoked before the last dam was erected,

1823.

Master
against
Hunt

(a) 7 Bingham 682.

CASES IN TRINITY TERM

1833.

Mason
vs. Hill.

and licence of the defendants, laid down pipes between his mill and that of the defendants, and took the hot water which came from the engine and mill of the said defendants unto and into his the plaintiff's manufactory for the purposes thereof, until *February* 1829, when the communication by means of the pipes was cut off by the plaintiff, and at that time and until the diversion thereof by the defendants as hereinafter next mentioned, the plaintiff appropriated and used part of the water of the stream which flowed over and through the dam so made at the *Sitchwell Tree*, and also the whole of the water which flowed from the *Sitchwell Spring*, and also from such part of the *Over Canal Springs* as were not taken into the tank, and also all the water which was returned by the pipes of the defendants into the stream, for the purposes of his mill and manufactory.

In *October* 1828, the plaintiff erected a steam-engine and mill for the purposes of his manufactory, and at that time, and until the diversion thereof by the defendants as next mentioned, appropriated and used part of the water of the stream which flowed over and through the dam so made at the *Sitchwell Tree*, and also the whole of the water which flowed from the *Sitchwell Spring*, and from such part of the *Over Canal Springs* as was not taken into the tank, and also the water which was returned by the pipes of the defendants into the stream, for the purposes of his said steam-engine, mill, and manufactory.

There is a ridge of land between the stream and the defendants' mill, manufactory, and premises, which, in the highest part, is thirteen feet, and in the lowest part, nine feet above the level of the mill of the defendants, and which would prevent the water of the stream from flowing in its natural course to the mill, manufactory,
and

The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream, flowing in its natural course, and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below—that neither can any proprietor above diminish the quantity, or injure the quality of water, which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant:—and that, whether the loss by diversion, of the general benefit of such a stream, be or be not, such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

The proposition of the defendants is, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, *including* the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so, may altogether deprive him of the benefit of the water.

In deciding this question, we might content ourselves by referring to, and relying on, the judgment of this Court in this case, on the motion for a new trial (a); but as the point is of importance, and the form in which it is

1888.

Mason
vs. Wright
Hind.

(a) 5 B. & Ad. 304.

1833.

~~MASON~~
~~against~~
~~Hill~~

now again presented to us, leads to a belief that it will be carried to a court of error; we think it right to give the reasons for our judgment more at large.

The position, that the first occupant of running water for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill; *The Earl of Rutland v. Bowler* (a). But it is a very different question, whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied; and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall, within its limits, might at any time be taken away; and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another.

We think, that this proposition has originated in a mistaken view of the principles, laid down in the decided

(a) *Palmer*, 290.

cases of *Beuly v. Shaw* (a), *Saunders v. Newman* (b), *Williams v. Moreland* (c). It appears to us also, that the doctrine of *Blackstone* and the dicta of learned judges, both in some of those cases, and in that of *Cox v. Matthews* (d), have been misconceived.

1833.

 MAISON
 against
 HILL.

In the case of *Beuly v. Shaw*, the point decided was, that the owner of land through which a natural stream ran, (which was diminished in quantity, by having been in part appropriated to the use of works above, for twenty years and more, without objection,) might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to that mill, by a further subsequent diversion of the water. This decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land through which the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above, for a subsequent act, by which that benefit is diminished; and it does not in any degree support the position, that the first occupant of a stream of water has a right to it against the proprietor of land below. Lord *Ellenborough* distinctly lays down the rule of law to be, that, "independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it

(a) 6 East, 208.

(b) 1 B. & A. 258.

(c) 2 B. & C. 913.

(d) 1 Vent. 137.

1833,

MASON
against
HILL.

an action against the party so diverting it; and that it was no answer to the action, that the defendants first appropriated the water to their own use, unless they had had twenty years' undisturbed enjoyment of it in the altered course. All the authorities were there cited and commented on. Assuming even that that decision was wrong, and that the right to water is, as the defendants say, acquired by occupancy, yet the plaintiff is entitled to recover, because it is here found that twenty years before the erection of the defendants' mill, the former owner and occupier of the plaintiff's land had appropriated and used the water of the stream and springs for watering his cattle, and for irrigating the land now belonging to the plaintiff. It will be said that the defendants were authorised by the parol licence to take part of the water. But that licence was revocable, and it was revoked by the plaintiff's destroying the dam in 1829. And even if that were not so, the licence being to make a dam, and thereby take water from a particular spot, was an easement, and could be granted only by deed: *Hewlins v. Shippam* (a), *Bryan v. Whistler* (b). In *Winter v. Brockwell* (c), and *Liggins v. Inge* (d), licence was held irrevocable, but there the thing to be done was on the land of the licensee. That distinction was taken in *Hewlins v. Shippam*. Besides, the licence here could not apply to a dam erected in a new place.

Peake Serjt. contra. The principal question is, whether the right to the use of flowing water can be acquired by the owner of adjoining land unless it has been enjoyed

(a) 5 B. & C. 221.

(b) 8 B. & C. 288.

(c) 7 B. East, 308.

(d) 7 Bingh. 682.

for twenty years. The former decision in this case proceeded principally on the authority of *Wright v. Howard* (a), but there the authorities upon the subject were not cited. The dicta of Lord Hale in *Cox v. Matthews* (b), and of Le Blanc J. in *Bealey v. Shaw* (c), recognised by Holroyd J. in *Saunders v. Newman* (d); and those of Bayley J. in *Williams v. Morland* (e), and Canham v. Fisk (g), shew that the right to flowing water is acquired by appropriation or occupancy. It was said upon the former argument in this case, that flowing water, like light and air, is publici juris. If that be so, it cannot belong to the owner of the land adjoining its channel, until it is appropriated. Mr. Justice Blackstone in his *Commentaries*, vol. 2. pp. 14. and 18., states water to be one of those things the property in which is acquired by occupancy. But assuming even that the proprietor of lands contiguous to a stream is prima facie entitled to the use of all the water which comes to his land, still here the former owner of the plaintiff's land having given a licence to the defendants to make a dam near the *Sitchwell Tree*, and to take what water they pleased from that point, it was not competent for him, or the plaintiff who claimed under him, to revoke that licence: *Taylor v. Waters* (h). *Liggins v. Inge* (i) is an express authority to shew that a parol licence (executed), to take water, is irrevocable. It may be conceded, that according to the authorities cited, a party cannot by parol take an

1838.

Mason
against
Hill.(a) 1 *Ston. & St. n.* 190.(c) 6 *East*, 208.(e) 2 *B. & C.* 913.(h) 7 *Townl.* 374.(b) 1 *Fent.* 237.(d) 1 *B. & A.* 258.(g) 2 *Tyrwh.* 155. 2 *Cro. & J.* 126.(i) 7 *Bingh.* 682.

1822.

Mason
against
Hill.

estate in the land of another, but a party may by parol licence acquire a right to the use of water, though not a right to have a passage for water over another's land, as in *Hetolins v. Shippam* (a).

Then this action is not maintainable by reason of the defendants' having accidentally taken more water than they were entitled to. The defendants were possessed of the right to take water either by licence or appropriation. The plaintiff then destroyed the defendants' dam, which they tried to restore, but, the plaintiff not suffering them quietly to enjoy his right, they made another dam on their own land, below the *Sitchwell Spring*, and thereby took at certain times more water than he was entitled to. But as that arose from the plaintiff's own misconduct, he cannot bring an action on the case for it, for a party who brings case must have justice on his side: *Bird v. Randall* (b). In *Comyns's Dig. Action on the Case*, (B) 4. It is said that it does not lie where the damage happens by the default or negligence of the plaintiff himself. As to the appropriation by *Ashley*, he merely acquired a right to the water for the purpose of irrigating his land and watering his cattle, but the plaintiff claims a right to have the water for the use of his mill.

Cur. adv. vult.

DENMAN C. J., in this term, delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows:—

The substance of the special verdict is this:—The defendants' mill was erected in 1818; the plaintiff's in

(a) 5 B. & C. 221.

(b) 3 Burr. 1545.

only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it."

None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the *Roman* law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

The *Roman* law is (2 *Inst. Tit. 1. s. 1.*) as follows:—

"Et quidem naturali jure communia sunt omnium hæc: aer, aqua profluens, et mare, et per hoc littora maris."

It is worthy of remark, that *Fleta*, enumerating the *res communes*, omits "aqua profluens," *Lib. 3. ch. 1. Vin-
cius*, in his commentary on the institutions, explains the meaning of the text,—*Communia sunt quæ à natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt: Huc pertinent, præcipue aer et mare, quæ cum propter immensitatem, tum propter usum, quem in commune omnibus debent, jure gentium divisa non sunt, sed relictæ in suo jure, et esse primævo adeoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbribus collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremò propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem natura comparatæ sunt, tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione*

1833,

MASON
opubist
Hila.

1853.

Mason
against
Hick.

and what part of it, or for the heating of the part returned?

That the plaintiff has a right to a verdict for the injury sustained by the abstraction of *the whole of the surplus water*, and by the abstraction of part, and the heating of the remainder, of that surplus water, does not admit of the least doubt. In any view of the law on this subject,—whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side,—the plaintiff was entitled to this surplus, for he filled both channels; he was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey v. Shaw* (a).

The learned counsel for the defendants argued, that inasmuch as the plaintiff pulled down the dam at the *Stickwell Tree*, in consequence of which the new dam was erected, he must be considered as the author of the mischief, and has no right to complain of it. It is, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it, or brought an action; they had no right to construct another at a different place, and by means of it abstract more water than the other did.

The remaining questions are, whether the plaintiff can recover, in respect of the abstracting, or the injury by heating, of that portion of water which was before

(a) 6 *East*, 208.

put upon the passage in *Blackstone*, and that the dicta of the learned Judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the *Roman* law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.

It remains to observe upon one case which was cited for the defendants (*Chr v. Matthews (a)*), in which Lord *Hale* said, "if a man hath a watercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say, *anti-quum molendinum*; and upon the evidence, it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that *he used to turn* the stream as he saw cause; for *otherwise* he cannot justify it, though the mill be newly erected." What is said by Lord *Hale* is perfectly consistent with the proposition insisted upon by the plaintiff; and the defendants in the supposed case, would have no right to divert unless they had gained it by prescription (which is the meaning of Lord *Hale*), or, according to the modern doctrine, until the presumption of a grant had arisen.

And this view of the case accords with the law, as laid down by Serjeant *Adair*, Chief Justice of *Chester*, in *Prescott v. Phillips (b)*, and by Lord *Ellenborough* in

1833.

MASON
against
HILL.
(a) 1 *Ventr.* 237.(b) Cited, 6 *East*, 213.

1899.

~~Macar~~
 Macar
 against
 Hill.

the defendants could not justify the abstraction of any portion of the water by virtue of the licence at such dam.

The last question is, whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the *Oss Canal Springs*, and collected in a tank in 1818. This was taken without licence, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course; and we are of opinion that they did not.

This point might, perhaps, be disposed of in favour of the plaintiff, even admitting the law to be as contended for by the defendants, that the first occupant acquires a right to flowing water; for, by this special verdict, all the water of the brook is found to have been appropriated by *Antley* the father, and used for twenty years up to the year 1818, for watering his cattle and irrigating the field, now the plaintiff's. A right to use the water, thus acquired by occupancy, in right of the field, must have passed to the plaintiff, and could not be lost by mere non-user from 1819 to 1899; and the total or partial abstraction of the water may be an injury to such

right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle upon which rights of this nature depend.

The

which appears from the report of the same case in *Comberbatch*, 43. to have been decided *for the plaintiff*.

It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shewn.

But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court.

Judgment for the plaintiff

SWEETAPPLE against JESSE.

Thursday,
May 23d.

DECLARATION in slander stated, that the plaintiff, until, &c., was reputed, &c., and had never been suspected to have been guilty of wilfully setting fire to his house and premises; and that, before the time of speaking the words by the defendant as thereafter mentioned, certain premises in the plaintiff's possession, situate at *Charlton*, in the county of *Hants*, had been destroyed by fire, yet the defendant, well knowing, &c., and intending to bring the plaintiff into public scandal and disgrace, and to cause it to be believed that he had been, and was, guilty of wilfully setting his house and premises on fire, as thereafter stated to have been charged upon and imputed to him by the defendant, and to subject him to the pains and penalties by the laws of this kingdom made, and provided for, and inflicted upon persons guilty thereof, theretofore, in a certain dis-

wilfully setting his own premises on fire was not, except under special circumstances, a crime punishable by law; and the Court would presume only such circumstances as it was essentially necessary for the plaintiff to have proved in support of his declaration.

Declaration stated, that defendant intending to cause it to be believed that plaintiff had been guilty of wilfully setting his house and premises on fire, said of the plaintiff, that he had set fire to his own premises, meaning that he had been guilty of wilfully setting fire to the premises, which, while in his occupation, had been destroyed by fire: After verdict for the plaintiff, the judgment was arrested, on the ground that

1832.

—
 SWEETAPPLE
 against
 JAMES.

course which the defendant had of and concerning the plaintiff, and of and concerning the said premises which had been, whilst in the possession and occupation of the plaintiff, destroyed by fire as aforesaid, spoke and published in the presence and hearing of *W. E.* and others, the false, scandalous, malicious, and defamatory words following: — “Have you (meaning the said *W. E.*) heard the report about the fire at *Charlton*?” (thereby meaning the fire by which the said premises, so in the occupation and possession of the plaintiff, were destroyed as aforesaid,) and upon the defendant being at the time of the speaking and publishing of the words as aforesaid, there asked, “What report?” he, the defendant, answered thereto, and said, in the presence and hearing of the said *W. E.* and of others, of and concerning the plaintiff, and of and concerning the said premises which had been, whilst in the possession and occupation of the plaintiff, destroyed by fire as aforesaid, the false, &c. words following, that is to say: — “Why that young *Sweetapple* (thereby meaning the plaintiff) has set his own premises on fire,” thereby meaning that the plaintiff had been guilty of wilfully setting fire to the said premises, so in the possession and occupation of the plaintiff as aforesaid. The declaration concluded in the usual way. Plea, general issue. The plaintiff obtained a verdict at the *Hampshire* Summer assizes, 1832, and in the following *Michaelmas* term, a rule nisi was obtained by *Dampier* for arresting the judgment, on the ground that the words in the declaration, taken in the sense there charged, were not actionable, inasmuch as the wilfully setting a man’s own house on fire is not necessarily a crime punishable by law; but, in order to make it a crime, the setting on fire

fire must be an act done with the intention, or calculated to have the effect of injuring others.

1833.]

Sworn
against
James

Merewether Serjt. and *Follett* now shewed cause. After verdict it must be presumed, that the words spoken were used by the defendant in the sense charged by the innuendos in the declaration, viz. that they were intended to impute to the plaintiff, that he had been *guilty* of wilfully setting fire to his own premises; and then *Peake v. Oldham* (a) shews, that after verdict the declaration is sufficient. Lord *Mansfield* there said, "that the word *guilty* implied a malicious intent, and could be applied only to something which was universally allowed to be a crime." [*Parke* J. The words may have been used in the sense charged in the innuendo without imputing to the plaintiff any crime, for he may have set fire to his own house wilfully without any intention to injure or defraud others. *Patteson* J. The act of setting on fire his own house may have been wilful, though not unlawful or criminal. It would not be sufficient in an indictment for such an act, to allege merely that the defendant had wilfully set fire to his house.] The defendant, after verdict, must be taken to have imputed to the plaintiff that he was *guilty* of having wilfully set his house on fire, and the Court, therefore, will presume all circumstances which were necessary to constitute the wilful burning a crime in point of law; viz. either that the house was insured, and that the intent was to defraud the insurers, in which case, it would be a statutable felony, by 7 & 8 G. 4. c. 30. s. 2.; or, that it was situate in a town, in which case, the setting it on fire would

(a) 1 Cowp. 278.

have

1833.

Swetnam
against
Jesse.

have been a misdemeanour at common law, *Hawkins's P. C.*, Book 1. c. 39. s. 15. It is sufficient, after verdict, if the charge made by the defendant is consistent with the guilt of the party. In a note to 1 *Wms. Saunders* 228. a., it is said, that where in debt for rent, by a bargainee of a reversion, the declaration omitted to allege the attornment of the tenant, which, before the statute 4 & 5 *Anne*, c. 16. s. 9., was a necessary ceremony to complete the title of the bargainee, and upon nil debet pleaded, there was a verdict for the plaintiff, such omission was cured by the verdict by the common law, *Fitchens v. Stevens* (a). [*Patteson J.* The judgment in that case proceeded on the ground, that if the plaintiff had not given the attornment in evidence, he must have been nonsuited, and the rule there laid down is, that wheresoever it may be presumed that any thing must of necessity be given in evidence, the want of mentioning it in the record will not vitiate it after verdict; but *Jackson v. Pesked* (b), and the authorities there cited, shew that the plaintiff is only bound to prove what the allegations in his declaration necessarily require to be proved.]

DENMAN C. J. After a verdict for the plaintiff, the Court are bound to presume all matters which it was necessary for him to prove in support of his declaration. Here the plaintiff was bound to prove that the words were spoken with the intent to impute to him that he had wilfully set fire to his house; but that is not necessarily a crime, and therefore the words, though spoken with that intent, are not actionable.

(a) 2 *Show.* 233. *Sir T. Raym.* 487.(b) 1 *M. & S.* 234.

LITTLEDALE J. After verdict for the plaintiff, the Court must presume such matters as it was necessary for him to prove, in order to support the allegations in his declaration. Now, here the plaintiff was bound to prove that the words spoken were intended to impute to him that he had wilfully set fire to his premises; but it is possible that he may have done such an act with an innocent purpose. Such an act is only a crime punishable by law under certain circumstances; and, it not being averred that the words were intended to impute that the plaintiff had done the act under such circumstances, the words spoken do not necessarily import that he had committed any offence, and are not actionable: consequently the judgment must be arrested.

1833.

~~Statement~~
against
Jesse.

PARKE J. I am of the same opinion. If the house of the plaintiff was contiguous to others, it might have been a misdemeanour at common law for him to set it on fire; but if the words in the declaration were spoken with an intent to impute that offence, it ought to have been averred that the house was contiguous to others. So, if his house was insured, and the words were spoken, with intent to impute to him, that he had set it on fire with intent to defraud the insurers, it ought to have been averred on the record, that the house was so insured, and that the words were spoken with that intent. Nothing of that sort is stated. There is nothing to shew that any offence was charged. After verdict, the rule is, as stated by my Brother *Littledale*, that those things must be taken to have been proved, which were necessary to support the averments in the declaration. If the declaration had alleged an intention

to

1833.

SWEETAPPLE
against
JESSE.

to impute by the words, that the plaintiff had been guilty of wilfully setting fire to his premises, under circumstances which would have made it a crime, then, after verdict, it must have been presumed that the words were proved to have been used in that sense.

PATTESON J. concurred.

Rule absolute.

Thursday,
May 23d.

WILLIAMS against JARRETT.

In the stamp act, 55 G. 3. c. 184. Schedule, Part 1. (title Bill of Exchange), which imposes a certain duty on bills "exceeding two months after date;" the date means the time expressed on the face of the bill, not the time when it actually issued. And although by sect. 12. if a bill purporting to be payable at two months from a certain time, be issued before the commencement of that period, without payment of a proportionate duty, the maker is liable to a penalty; yet a bill so post dated, and bearing the inferior stamp, corresponding with the purport of the bill, is admissible in evidence, being, on the face of it, conformable to the schedule.

ASSUMPSIT by indorsee against drawer of a bill of exchange for 90*l.*, payable two months after date to *John Harris* or order. Plea, the general issue. At the trial before *Patteson J.* at the *Bristol* Summer assizes 1832, it appeared that in *July* 1831, *Harris*, having a demand on the defendant for wheat sold to him, wrote the bill in question on a three-and-sixpenny stamp, and sent it to the defendant for signature. It was dated *August* 1, 1831. The defendant signed and returned it to the messenger. This occurred at least a week before the 1st of *August*. On that day, *Harris* sent the bill, indorsed by him, to the plaintiff, who gave him the money for it. It was objected, on behalf of the defendant, that the bill had been *issued* before the 1st of *August*, and post-dated, and therefore being payable at two months after date, it should have had a four-and-sixpenny stamp, according to 55 G. 3. c. 184.

Schedule,

Schedule, part 1. title "Bill of Exchange," and section 12. (a). The learned Judge nonsuited the plaintiff upon this objection, and in the next term a rule nisi was obtained for a new trial on the authority of *Upstone v. Marchant* (b).

1883.

WILLIAMS
against
JARRETT.

Merewether Serjt. and *Crowder* now shewed cause. It is true that in *Upstone v. Marchant* (b) this Court held that the word "date" in the schedule denoted the period of payment on the face of the bill. But the twelfth section of the act was not adverted to there. The date on the face of a bill is only *primâ facie* evidence: substantially the date is the time when it is issued. The twelfth section of 55 G. 3. c. 184. clearly gives this effect to the word "date" in the schedule, for by that clause if a bill be made payable at a certain time after date, and be dated subsequently to the day on which it is issued, so as not in fact to be payable within two months, then unless the same shall be stamped so as to denote the duty on bills payable *more than two months after date*, the party making or issuing such bill shall forfeit 100*l*. The provision of the schedule would be

(a) The schedule imposes a duty of 4*s*. 6*d*. on inland bills, from 50*l*. to 100*l*. in amount, "exceeding two months after date, or sixty days after sight." By sect. 12. it is enacted, "that if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory note for the payment of money, at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two months, if made payable after date, or in sixty days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange and promissory note, for the payment of money at any time exceeding two months after date, or sixty days after sight, he, she, or they shall, for every such bill, draft, order, or note, forfeit the sum of 100*l*."

(b) 2 B. & C. 10.

VOL. V.

D

defeated

1833.

WILLIAMS
against
JARRETT.

defeated if the time mentioned on the face of the bill were looked to as the real time of issuing. [*Parke J.* There would still be the penalty of sect. 12. to prevent fraud. That clause was necessarily inserted to effectuate the provision in the schedule; as, in the case of a conveyance, in the same schedule, the duty is proportioned to the amount of consideration-money expressed in the conveyance, and it is directed that the consideration shall be truly expressed; and by another act, 48 G. 3. c. 149. s. 22, &c. penalties are imposed in case that be not done (a).] In *Pasmore v. North* (b), where a bill was drawn on the 4th of May, and indorsed on the 5th, but bore date the 11th, Lord *Ellenborough* asked whether it would be said "that the bill was in abeyance in the intermediate time between the issuing of it and the date?" In *Upstone v. Marchant* (c), and in *Peacock v. Murrell* (d), which will be cited to the same effect, it does not appear that the bills were actually issued before the day of the date. [*Patteson J.* In the first case the bill when accepted was delivered to the drawer.] A bill made payable at a certain time after date would require a stamp, though no date were actually put upon it; this shews that the "date" of a bill does not depend merely upon the figures that may be written on its face. In pleading, it is not necessary to say when the bill bore date. The schedule of 55 G. 3. c. 184. must be construed with a reference to the twelfth section; the latter may be an additional safeguard, to secure the same object, but is not to be considered an independent provision.

(a) But the deed is not therefore void. *Robinson v. Macdonnell*, 5 M. & S. 234. See, for other cases, *Coventry on Stamps*, c. 5., p. 53, &c.

(b) 13 East, 591.

(c) 2 B. & C. 10.

(d) 2 Stark. N. P. 558.

Follett,

Follett, *contra*, was stopped by the Court.

1833.

WILLIAMS
against
JARRETT.

DENMAN C. J. I am of opinion, that the rule must be absolute. If a bill bears no date, we must ascertain, by evidence, the day when it issued; but where there is a date, that must be considered as the time to which the schedule refers.

LITLEDALE J. concurred.

PARKE J. I am of the same opinion. There are two decisions on this point, which have been cited; and I recollect a third to the same effect, not reported (a).

PATTESON J. I should not have directed a nonsuit, if my attention had been drawn to *Upstone v. Marchant* (b).

Rule absolute.

(a) *Follett* mentioned *Johnson v. Garrett*, 2 Chitt. Rep. 122.

(b) 2 B. & C. 10.

SIMPSON *against* RENTON.

Friday,
May 24th.

DECLARATION in debt for a penalty of 50*l.*, for taking the plaintiff to gaol within twenty-four hours from the time of arrest, he not having refused to be
By the 32 G. 2. c. 28. s. 1. it is enacted, that no sheriff's officer shall carry any person arrested by him to gaol within twenty-four hours from the time of such arrest, unless such person shall refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment; and by sect. 12. a penalty is imposed on any officer offending against the act:

Held, in an action brought for the penalty, for taking a party to gaol within twenty-four hours, contrary to the statute, that the officer who made the arrest, ought to have required the party arrested to nominate some convenient dwelling-house to be taken to; for the latter could not be said to have *refused* till the proposal had been made: and a mere omission by him to nominate a place, did not justify carrying him immediately to gaol.

1833.

 SIMPSON
 against
 RENTON.

carried to some convenient dwelling-house of his own nomination, contrary to the statute 32 G. 2. c. 28. s. 1. At the trial before *Parke J.*, at the *York Summer assizes 1832*, the following appeared to be the facts of the case.

The defendant, who was the keeper of the gaol for the liberty of *Knaresborough*, and the officer for executing writs within that district, arrested the plaintiff at *Harrowgate*; and, after keeping him three hours at an inn there, removed him to *Knaresborough* gaol, which is two miles from *Harrowgate*. The plaintiff, during the time he remained at the inn, behaved with great violence to the officer, and attempted to escape. There was no proof that the plaintiff named any dwelling-house to which he wished to be carried, or that the defendant had ever desired him to do so, or informed him that he might. It was contended for the defendant, that if the party arrested wished to avail himself of the privilege of going to a private house, it was incumbent on him to request the officer to take him to one of his own nomination, and that an omission to make such request was a refusal to nominate within the meaning of the act of parliament. The learned Judge was of opinion, that there could be no refusal until the party was called upon to nominate a dwelling-house, and, there being no proof in this case to such effect, that the plaintiff was entitled to a verdict. A rule nisi having been obtained for a new trial, on the above point,

Knowles now shewed cause. The stat. 32 G. 2. c. 28. was passed for the relief of debtors, and ought to be construed so as best to effectuate that intent. By s. 1. the sheriff, bailiff, &c. is prohibited from taking a party
to

to gaol within twenty-four hours from the time of his arrest, unless he shall refuse to be carried to some convenient dwelling-house of his own nomination. There must, therefore, be either a refusal by the party arrested to nominate any convenient dwelling-house, (or, having nominated one,) a refusal to be carried there. Here there was no refusal by the plaintiff to nominate a house, for he was never asked to do so. In *Dewhirst v. Pearson (a)*, *Bayley* and *Gurney* Barons, expressed an opinion that this was the true construction of the act; and here the maxim does not apply, that ignorance of the law shall not excuse, for the third section of the act presumes the ignorance of the party arrested, and expressly provides for it by enacting that a copy of the clauses of the act shall be delivered to every gaoler and sheriff's officer, and that it shall be part of the condition of the bond into which such persons enter, to deliver a copy to every person arrested.

1833.

SIMPSON
against
RENTON.

F. Pollock and *Dundas* contra. The Court of Exchequer, in *Dewhirst v. Pearson (a)*, were not unanimous on this point; for *Vaughan B.* said it was a grave question, and thought there ought to be a new trial, to give the defendant an opportunity of putting it on the record. The act being penal, ought to be construed strictly. Section 3. does not require a copy of the clauses to be delivered to a party arrested until he is in a house, and requires meat and drink. Besides here, the party having conducted himself with violence in the inn, and attempted to escape, the defendant was entitled to take him at once to prison. The reason given by

(a) 3 Tyrwh. 242. 1 Cro. & M. 365.

1833.

SMITHSON
against
RENTON.

Lord *Kenyon*, in *Evans v. Atkins* (a), for the provision that a party shall not be carried to gaol within twenty-four hours after his arrest, unless he shall refuse to be carried to some convenient house of his own nomination, is, that he may have an opportunity of procuring bail, or agreeing with those persons at whose suit he is arrested; but a party who, like the plaintiff, conducts himself violently, and attempts to escape, has no intention of procuring bail or agreeing with his creditors; he is, therefore, not a person contemplated by the act. In an *Anonymous* case (b), before the statute in question, *Holt* C. J. said, that, "after arrest, the bailiff ought to carry the party to the next gaol if he do not desire to be carried to a place for to send for his friends."

DENMAN C. J. I think it quite clear, from the words of section 1., that the legislature intended that the bailiff should offer the party arrested an opportunity of nominating a dwelling-house to which he might go. That is the construction I should put on the section, independently of any authority, but my opinion is confirmed by the case of *Dewhirst v. Pearson* (c) in the Court of Exchequer.

LITTLEDALE J. By the words of section 1., a sheriff's officer is prohibited from carrying any person arrested by him to gaol within twenty-four hours from the time of his arrest, "unless such person shall *refuse* to be carried to some safe and convenient dwelling-house of his own nomination or appointment." To justify the officer, therefore, in carrying the party to gaol within

(a) 4 T. R. 556.

(b) 6 Mod. 96.

(c) 3 Tyrwh. 242.

that

that time, there ought to have been a previous refusal by him, either to nominate a house, or, after having nominated one, to be carried to it. A mere omission or neglect to do an act, is not a refusal. That word implies something more. If the plaintiff had been asked to nominate a convenient dwelling-house, and had not done so, that would have been a sufficient refusal.

1833.

SIMPSON
against
RENTON.

PARKE J. I thought at the trial, that the refusal of the party arrested to be carried to some convenient dwelling-house of his own nomination was a condition precedent to the right of the officer to take him to gaol within twenty-four hours from the time of the arrest, and that it ought to have been proved, either that the plaintiff, on being asked to nominate a convenient dwelling-house, had refused to do so; or, that having nominated one, he had refused to be carried there. I thought then, as I think now, that there could not be a refusal to do an act until the party had been called upon to do it; and my opinion on that point is confirmed by those of *Bayley* and *Gurney* Barons in *Dewhirst v. Pearson* (a).

PATTESON J. My opinion proceeds entirely upon the words of the first section of the act. I cannot conceive how a person can be said to have refused to do an act, until it has been proposed to him to do it. The plaintiff, therefore, cannot be said to have refused to be carried to a house of his own nomination, because he was never desired to name any house.

Rule discharged.

(a) 5 *Tyrbh.* 242.

1833.

Saturday,
May 25th.

JAMES against THOMAS and Another.

On a bond with a penalty, conditioned for the payment of money at a given day, and interest in the mean time, with a stipulation that on any default in paying the interest, the whole sum should be demandable; the obligee, on the interest falling into arrear, brought an action to recover the whole principal and interest:

Held, that the case was not within 8 & 9 W. 3. c. 11. s. 8., and, therefore, that the plaintiff was entitled after verdict, to have judgment and execution for the whole principal sum, and not merely for the arrears of interest.

THE plaintiff brought an action of debt on a bond in the penal sum of 560*l.*, conditioned for the payment of 280*l.*, in three years from the date of the bond, with 5 per cent. interest payable half yearly; "and also that the said plaintiff should be at liberty to call in and demand payment of the said principal money and all interest thereon, in default of the payment of the said interest half-yearly." The declaration stated, that one year's interest being due and unpaid, the plaintiff demanded the principal and all interest thereon, but the defendants did not pay; whereby the bond became forfeited. The particular of demand stated the action to be brought to recover the principal sum of 280*l.*, and interest as above, from the date of the bond to the day of payment therein mentioned.

E. V. Williams now moved for a rule to shew cause why, upon payment of the year's interest above mentioned, all further proceedings should not be stayed; and he cited *Masfen v. Touchet* (a), where the obligee of a bond conditioned to pay 600*l.* and interest, in three years from the date of the bond, by instalments of 15*l.* half-yearly, and 615*l.* at the end of the term, brought an action, on default made in paying the interest, and recovered for the whole penalty; and the Court ordered judgment to be entered for the whole, with stay of exe-

(a) 2 W. Bla. 706.

cution on payment of the interest due. [*Parke J.* The condition there was different. Here it is, that on any default of payment the whole sum shall be due.] It is the same, virtually, on any bond with a penalty. [*Patterson J.* The judgment on an ordinary bond would be for the penalty; but then the defendant would be relieved by 8 & 9 *W. 3. c. 11. s. 8.*, on paying the arrears found due upon trial or enquiry. *Parke J.* In the case cited the same end was attained, only by a shorter course.] It is not clear, in this case, that the plaintiff ought not to assign breaches, according to the statute, to entitle himself under the condition; and then he would gain no more than he may by what is now proposed. [*Parke J.* Yes; by the special agreement embodied in the condition, he would recover 280*l.* and interest. *Littledale J.* This is like the case of a warrant of attorney, where the Court never holds a party entitled to relief under the statute.]

Per Curiam. There must be no rule.

Rule refused.

The cause was tried at the ensuing Summer assizes for *Glamorganshire* before *Bosanquet J.*, and a verdict was found for the plaintiff for 1*s.*, but leave given to the defendant to move that a verdict should be entered for such sum as the Court should think fit. In *Michaelmas* term (*Nov. 6th*),

E. V. Williams moved that a verdict should be entered upon the record for 20*l.*, the actual arrear of interest, and no more, as in actions upon bonds with a penalty,

1833.

JAMES
against
THOMAS.

1833.

JAMES
against
THOMAS.

penalty, within 8 & 9 *W. 3. c. 11. s. 8.*, and the plaintiff be at liberty to levy for that amount only, the judgment standing as a security in case of future breaches. He contended that the case was, substantially, within the statute, the provision that, in default of paying the interest, the whole sum should become due, being in the nature of a secondary penalty. It is as if an annuity had been granted, with a fixed sum to become due on default in any of the payments. That sum would be merely a penalty to secure the payments. [*Parke J.* You would represent this as a bond with two penalties. The effect of the provision here is, that on any default the 280*l.* becomes payable as the debt; it is not a mere penal sum to secure the interest.] The intention of the statute of *William* was to prevent the necessity of going into a court of equity. That reason applies to the present case. A court of equity would relieve the defendant. [*Parke J.* I question whether it would.]

The Court(a) refused a rule.

(a) *Denman C. J., Parke, Taunton, and Patteson J.*

1833.

DOE dem. ROBERT SMITH, WILLIAM CLEEVE, and JONATHAN SOUTHAM, and of WILLIAM MARSH, JOSIAS HENRY STRACEY, and MONTGOMERIE STEWART *against* ANN GALLOWAY.

*Saturday,
May 25th.*

EJECTMENT. At the trial before *Gurney B.*, at the *Oxford* Summer assizes 1832, it appeared that the premises claimed consisted of a cottage with the appurtenances, in the possession of the defendant, in *Blenheim Park*. *Marsh, Stracey, and Stewart* had extended a moiety of *Blenheim Park* under a writ of *elegit*. The moiety was regularly set out upon the inquisition, and delivered to *Marsh, Stracey, and Stewart*, who leased it to one *Richard Smallbones*. *Smallbones* held also the remainder of the *Park* under another title, and he held the moiety leased to him by *Marsh, Stracey, and Stewart* up to the 22d of *June* 1824. By deed dated that day, *Marsh, Stracey, and Stewart* demised to *Smith, Cleeve, and Southam*, all that part of the park, called or known by the name of *Blenheim* or *Woodstock Park*, situate and being in the county of *Oxford*, and now in the occupation of one *Richard Smallbones*, in a direct line across the said park from the gate called *Old Woodstock Lodge*, (following the words of the inquisition,) lying on the north-west side of the said line, (setting out the other abutments in the words of the inquisition,) together with the farm houses, and other houses, &c. belonging or appertaining to the said premises, and which now are in the occupation of the said *R. S.*, except and always reserved

Under a lease of all that part of the park called *B.*, situate and being in the county of *O.*, and now in the occupation of *S.*, lying within certain specified abutments, with all houses, &c. belonging thereto, and which now are in the occupation of *S.*, a house on a part which is within the abutments, but not in the occupation of *S.*, will pass.

unto

1833.

DOX dem.
SMITH
against
GALLOWAY.

unto the said *W. Marsh, J. H. Stracey, and M. Stewart*, their executors, administrators, and assigns, all mines and quarries of stone, timber, and other trees whatsoever (with a like exception and reservation of hedges, of a right of hunting, shooting, fishing, and fowling, and of the liberty of keeping a herd of deer in the park, and depasturing three heads of cattle there). Since the execution of this deed, *Marsh, Stracey, and Stewart* had become bankrupts, and all their property had been regularly assigned before the action was brought; the plaintiff, therefore, relied upon the lease to *Smith, Cleeve, and Southam*. The premises claimed were within the line and abutments set out in the inquisition and lease: but the defendant had occupied them, by the permission of the original owner, up to the time of the inquisition, without paying any rent, no demise having been made to her. *Smallbones* had also suffered her to occupy them in the same way during the whole time of his tenancy; and she had continued in a similar occupation up to the time of the action brought. It was now insisted for her, that the premises, not having been in the occupation of *Smallbones*, did not pass by the lease. The learned Judge directed the jury to find a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. The defendant obtained a rule to that effect in *Michaelmas* term, 1832.

Talfourd Serjt. and *Walesby* now shewed cause. There can be no doubt that the intention of the parties to the lease of the 22d of *June* 1824, was that all which the lessors held by the elegit should pass; and the words of the demise are sufficient to carry that into effect.

effect. The premises are locally within the line set out in the later part of the description, and the words added respecting the occupation are mere surplusage. Besides this, the defendant resided on the premises by the permission of *Smallbones*; they may, therefore, be considered to have been in his occupation. If it be contended that the part granted is limited, by grammatical construction, to the part occupied by *Smallbones*, the answer is that, by such a construction, all that was occupied by *Smallbones* would be within the grant. Now that would comprehend parts of the park without the described line. Besides, the lease goes on to make certain exceptions; and, if the present premises were not within the intention of the lessors, they also would have been marked off from the property within the prescribed line by a specific exception. In *Wrottesley v. Adams (a)*, the words of a lease, as set out on the record, were “granted and to farm let to the same *R. W.*, the tenements aforesaid, with the appurtenances, by the name of the reversion of all their [the grantors’] farm in *B.*, and by the name of one other tenement there, with all the lands, leasows, pastures, and meadows to the same belonging, and with all and singular their appurtenances then in the tenure and occupation of the aforesaid *R. W.*” On demurrer, an exception was taken that the “tenements aforesaid” (being the premises mentioned in the declaration) were not averred to have been in the tenure and occupation of *R. W. (b)*. But the Court held that the averment was not necessary, and said that “another certainty put to a thing which was certain enough be-

1833.

Dor dem.
SMITH
against
GALLOWAY.

(a) *Plowd.* 187.

(b) 5th exception, p. 191.

fore

1833.

DOE dem.
SMITH
against
GALLOWAY.

fore was of no manner of effect ; and therefore there is a diversity where a certainty is added to a thing which is uncertain, and where to a thing certain." Therefore it was considered not to be material, whether the farm of *B.* was in the tenure of *R. W.* or not. The Court also held, that the words "one other tenement" were not material to make the lease good ; and, consequently, that, so far as the farm of *B.* was concerned, no averment was necessary (a). So, where a demise was made of "all that their [the grantors'] glebe lands lying in *C.*, viz. seventy-eight acres of land, and also the demesnes of the said seventy-eight acres, with all profits, commodities, tithes personal and predial, &c., belonging to the said subchanter and vicars, as parsons and proprietaries of the parish church of *C.*, &c., and all other tithes whatsoever, and also the tithes of the said seventy-eight acres, all which were lately in the farm and occupation of *M. P.* ;" and it was found, on special verdict, that none of the tithes of the lands mentioned had been in the possession of *M. P.*, but that other tithes and lands were in the tenure of *M. P.* ; it was held, that the tithes of the lands mentioned passed by the demise. *Swift, Subchanter, and one of the Vicars Choral of Litchfield v. Eyres and Others* (b). The maxim, that where there is sufficient certainty in a description a false reference added shall not destroy its effect, was lately recognised in *Doe d. Ashforth v. Bower* (c). [Parke J. The general rule is laid down in *Dodding-ton's Case* (d), and in the note added at the end of the

(a) *S. C.* 195.(b) *Cro. Car.* 546. *S. C. W. Jones*, 435.(c) 3 *B. & Ad.* 459.(d) 2 *Rep.* 32. b.

judgment

judgment there. There are also cases on the same point in *Rolle's and Viner's Abridgments*, Grant (a).]

1833.

Doct. dent.
Smith
against
GALLOWAY.

Jervis and *Cooper* in support of the rule. It must be conceded that if the words "and now in the occupation," &c. had followed the particular description, the case would have fallen within the rules laid down in the cases cited. But here the words relied upon by the defendant, precede the particular description; therefore, according to *Wrottesley v. Adams* (b), and *Swift v. Eyres* (c), and *Doddington's case* (d), the particular description must be rejected, if there be any inconsistency. And this was held in the case of *Stukeley v. Butler* (e). There a bargain and sale was made of all woods, underwoods, &c. standing, growing, &c. in the whole of the bargainor's manor of C., viz. in all his wood called E., and in all his wood called B., and in other woods expressly named: and it was adjudged that woods in C., not being in any of the woods afterwards expressly named, should pass by the conveyance. [*Denman C. J.* As you construe the sentence, the question would be, whether you are compelled to resort to all the description for the purpose of understanding the meaning. Suppose the premises had been described by reference to a coloured plan, and the words had been "all the part coloured green and now in the occupation of A. B.," all the green must have passed, though some of

(a) 2 *Rol. Abr.* 54. 14 *Vin. Abr.* 87. See also 2 *Rol. Abr.* 423. and 425. *Rent*, B. 6. D. 7. "If a man grants and confirms to another in fee 10s. rent, to take out of certain land, which rent he has of the grant of his father, though he never had any thing of the grant of his father, yet this shall create a rent."

(b) *Plowd.* 187.

(c) *Cro. Car.* 546.

(d) 2 *Rep.* 32.

(e) *Hob.* 168. (edit. 1724.)

1833.

—
Doe dem.
SMITH
against
GALLOWAY.

it had not been the occupation of *A. B. Littledale J.* Is it not the same thing, whether the place be expressly named, or its limits particularly set out? In *Doe d. Parkin v. Parkin (a)*, it was held that a devise of all hereditaments in *T.* and then in the devisor's own occupation, would not pass hereditaments in *T.* not occupied by the devisor. In *Blague v. Gold (b)*, it was held that the devise of "the corner house in *A.* in the tenure of *B.* and *H.*," passed a corner house in *A.* which was in the tenure of *B. (c)*, (though not a house in the tenure of *H.* not being a corner house); and the reason given was, that the devise was of a thing certain at the first. Where a lease was made of a room, a cellar, a vault, and a yard, all expressly set out and described to have been late in *A.*'s occupation, it was held that a cellar, not expressly named, which was under the yard, but which had not been in the occupation of *A.*, would not pass, *Doe v. Burt (d)*. The word "and," here, is superfluous in the description; the meaning must be the same as if the description of the parcels had been, "All that part, &c. which is now in the occupation of *Smallbones*, in a direct line," &c. *Doe d. Ashforth v. Bower (e)* is in favour of the defendant; for there the Court held that such premises only passed by the devise, as were within the whole of the description, excluding such as corresponded to a part only of the description. In *Swift v. Eyres (g)*,

(a) 5 *Town.* 321.

(b) *Cro. Car.* 447, 473. See also *Hunt v. Singleton, Cro. Eliz.* 478.

(c) This house was found by the jury to be in the tenure of *B.* and *N.* and the Court held, that if it were a joint tenure, all the house should pass, but that if one part were in the tenure of *B.*, and another part in the tenure of *N.*, the former part only should pass.

(d) 1 *T. R.* 701.

(e) 3 *B. & Ad.* 453.

(g) *Cro. Car.* 546.

there

there was an exception of the small tithes, which shewed the intention of the parties to pass all the great tithes; here all that is excepted may be considered as merely in the nature of an easement or a privilege.

1833.

DOZ dem.
SMITH
against
GALLOWAY.

DENMAN C.J. Two parts only of the description of the premises can be relied upon in support of the restrictive construction of this lease. The first part is the expression which occurs early in the description; "all that part of the park called or known by the name of *Blenheim* or *Woodstock Park*, situate and being in the county of *Oxford*, and now in the occupation of *Richard Smallbones*." But, as to this expression, it is impossible not to see that the words "and now in the occupation" are, as it were, in the genitive case, agreeing with "park," not with "part." The other part of the description, which seems to favour the restrictive construction, occurs towards the close of the description; "together with the farm houses and other houses, &c. appertaining to the said premises, and which now are in the occupation of the said *Richard Smallbones*." Had this occurred in a will, it might possibly have been interpreted as a qualifying restriction: but we cannot hold that general words added, as here, for the protection of a grantee, qualify the words by which the boundary of the district is set forth.

LITLEDAL J. I am entirely of the same opinion. If the words "now in the occupation of one *R. S.*," had followed the words "county of *Oxford*" directly, there might have been some ground for contending that the lease was intended to pass only all the part of *Blenheim Park* then in the occupation of *Smallbones*. Even then, it

VOL. V.

E

would

1893.

DOE dem.
SMITH
against
GALLOWAY.

would have admitted of considerable doubt whether such a construction were admissible. But the interposition of the word "and" precludes it altogether. It is contended that the words "now in the occupation," &c. are an essential part of the full description. If that were so, the description would mean much more than is suggested; for *Smallbones* occupied in *Blenheim Park* much besides that which the lessors had the power of passing. That which follows "the county of *Oxford*," is merely what is called false demonstration; and false demonstration cannot restrict. Taking the words as they are, it appears to me that all which is described in the words following the description of the occupation, will pass. Many cases have certainly gone upon the circumstance that the particular description came first; in which it has been held that the effect of such a description is not altered by words of suggestion, or false demonstration, following it. Such are *Doe d. Beach v. The Earl of Jersey* (a), and of *Doe d. Ashforth v. Bower* (b). And, in the present case, it is contended that as the first part of the description is sufficiently certain, its effect cannot be destroyed by what follows. But in *Chamberlaine v. Turner* (c), the later words were held to enlarge a devise beyond the effect of the earlier ones. There the words were "the house or tenement wherein *William Nicholls* dwelleth, called the *White Swan*," and *William Nicholls* occupied only the entry or alley and three upper rooms. But it was considered that the words "*White Swan*," shewed that all the house was meant. And the same argument would apply here, even if we were to take the words "now in occupation"

(a) 1 B. & A. 550.

(b) 3 B. & Adol. 453.

(c) Cro. Car. 129.

as referring to the word "part." *Chamberlaine v. Turner* closely resembles the present case.

1839.

Doct dem.
SMITH
against
GALLOWAY.

PARKE J. I am of the same opinion. The question is, what passed by this demise. Now the rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration: but that if premises be described in general terms, and a particular description be added, the latter controuls the former. Here is a grant of all that part, &c. in general terms; had it been a grant of all that part now in the occupation of *Richard Smallbones*, and lying on the north west side of the line, the occupation would have been a material part of the description, and nothing would have passed which was not both in the occupation of *Smallbones*, and on the north west side of the line. But if the terms "now in the occupation" apply, not to "part," but to "park," they may be rejected, for they can be no more than an additional description of the park; so that the meaning would be, "all that part of the park which is called *Blenheim Park*, and is now in the occupation of *Smallbones*;" and then follows the description of the part which is to be demised. Therefore, under the clause following, all the farm houses, &c. belonging to the part demised, pass also; so that we may reject the false demonstration which comes after this clause. It seems to me that this is the true construction of the early part of the grant, in consequence of the word "and;" and the minute description which follows, cannot be brought into doubt by the words which come after it.

Rule discharged.

1833.

*Saturday,
May 25th.*

**The KING against JOHN HENRY MANNERS
SUTTON, Esquire.**

On indictment for non-repair of a highway, which defendant was stated to be liable to repair *ratione tenuræ*, and verdict found for the defendant, a new trial was moved for on the ground of misdirection, and the improper rejection of evidence. The Court refused a new trial, but suspended the judgment, in order that a new indictment might be preferred.

Quære, whether a new trial is grantable after acquittal in any criminal case, except a penal action?

THE defendant was indicted for the non-repair of *Kelham Bridge*, in the county of *Nottingham*, which, it was alleged, he was bound to repair *ratione tenuræ*. Plea, not guilty. At the trial before *Parke J.*, at the summer assizes for *Lincolnshire*, 1832, a verdict was given for the defendant. In the ensuing term Sir *James Scarlett* obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, on the grounds, first, of misdirection, and, secondly, that the learned judge had refused to admit as evidence certain rules of court of the reign of *Charles II.*, which were relied upon on the part of the prosecution, as shewing that, on an indictment preferred in that reign, the liability of an ancestor of the defendant to repair the bridge, by reason of his tenure of the same lands, had come in question, and he had been found liable. The objection made to the reception of these documents was, that they could only be admissible as secondary evidence of a judgment against the ancestor, and no ground was laid for the admission of such secondary evidence, inasmuch as the want of the original records was not accounted for, and it did not sufficiently appear that the ancestor was a party to the proceedings in question.

The *Solicitor-General*, *Adams Serjt.*, and *Amos*, now shewed cause. The court cannot grant a new trial
after

after acquittal, in a case of misdemeanor. There is no distinction, in this respect, between one kind of offence and another, nor is there any authority for the practice. [*Parke J.* May it not be granted for misdirection (a)?] By consent only, as in *Rex v. Russell* (b). It is against the general rule, that a party shall not be twice in jeopardy on the same charge. The case of a penal action is different from that of a misdemeanor at common law, because in the first the punishment is limited, in the other, discretionary. A quo warranto information is excepted out of the rule (c); but that is a merely civil proceeding. The practice where a defendant has been acquitted on indictment is laid down in 2 *Tidd* 911. The Court has, indeed, under very special circumstances, suspended the entry of judgment, to give opportunity for another trial, *Rex v. Wandsworth* (d); but this is not, in its circumstances, a case for such interference; and there was here neither consent of parties, nor any point reserved at the trial. In *Rex v. Reynell* (e), and *Rex v. Mann* (g), the court (relying upon the general rule) refused to grant a new trial after verdict for the defendant, notwithstanding the instances which had occurred of such rule being granted, after acquittal, in a penal action, and in a quo warranto. So in *Rex v. Burbon* (h), a new trial was refused, when the defendants had been acquitted on indictment for non-repair of a highway, Lord *Ellenborough* observing that the right was not bound. [*Parke J.* The same case is

1833.

The King
against
Sutton.

(a) See (as to a penal action) the observations of Lord *Kenyon* in *Colcraft v. Gibbs*, 5 T. R. 20.

(b) 6 B. & C. 569.

(c) *Rex v. Francis*, 2 T. R. 484.

(d) 1 B. & A. 63.

(e) 6 East, 315.

(g) 4 M. & S. 337.

(h) 5 M. & S. 392.

1833.

The King
against
Sutton.

mentioned in a note to *Rex v. Cohen* and *Jacob* (a), where the court is stated to have said that the rule might be relaxed in some cases, in which rights would otherwise be compromised.] Here it is not so; the verdict of not guilty might have been given on the ground that no want of repair was proved. In *Rex v. Cotton* (b), a prosecution for non-repair of a highway, evidence was offered for the prosecution, which *Dampier* J. rejected, and the consequence was a verdict for the defendant. That learned judge, in deciding upon the inadmissibility of the evidence, said, "I wish that my opinion upon it could be reviewed; but in the manner in which it arises, that is impossible." Lord *Kenyon* said, in *Rex v. Mawbey* (c):—"In misdemeanors there is no authority to show that we cannot grant a new trial, in order that the guilt or innocence of those who have been convicted, may be again examined into(d)." There two of the defendants had been acquitted; but the observation clearly must be applied only to those who were convicted. In *Rex v. Cohen* and *Jacob* (a), an attempt was made to distinguish between motions for a new trial, on the ground of misdirection, and on the merits; but Lord *Ellenborough* did not admit the distinction. And there is no instance, except in the particular cases which have been pointed out, where, after acquittal on a criminal charge, the court has granted a new trial. (They then went into an argument upon the evidence, which it is unnecessary to notice here, as the court pronounced no opinion on that part of the case.)

(a) 1 Stark. N. P. C. 516. (b) 3 Campb. 444. (c) 6 T. R. 638.
(d) See *Parke v. Godin*, 2 Stra. 813. Bull. N. P. 326. b.

Sir *James Scarlett* contra. The only instances in which it has been laid down that the Court would not grant a new trial after acquittal in a case of this description, have been where the verdict was upon the merits, and where the parties acquitted were charged by common right with the repairs, so that the verdict of not guilty would not bind any right. Lord *Ellenborough's* ruling in *Rex v. Mann* (a) was, that a new trial is not granted on indictments for misdemeanor, "where a verdict has passed for the defendant upon the merits." That was an indictment for a nuisance; and it does not appear that any right was concluded by the verdict. In *Rex v. Waudsworth* (b), which has been alluded to, the ground of motion was, that the verdict was against evidence; and there the Court adhered to the general rule, in refusing to set the verdict aside, but considering the peculiar circumstances, and that a judgment for the defendants would have been conclusive as to the right upon another trial, the Court suspended the entry of judgment till a fresh indictment could be tried. Until the decision in *Wilson v. Rastall* (c) an opinion prevailed that the Court could not grant a new trial after verdict for the defendant in a penal action: but the Court there granted the rule, and Lord *Kenyon* said, "there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the Judge." Technical distinctions may be drawn between a penal action and an indictment, but an action for penalties under the bribery act is in its nature as much a criminal prosecution as an indictment for non-repair of a highway. That case

1838.

The King
against
Sutton.

(a) 4 M. & S. 357.

(b) 1 B. & A. 63.

(c) 4 T. R. 753.

1833.

The King
against
Sutton.

alone, therefore, would be a precedent for granting the present application. The form of the record makes no substantial difference. Before the statute 4 & 5 *W. & M.* c. 18. any person might file an information in this Court in the name of the Master of the Crown Office, and hence the statutes which give a remedy by penal action commonly enable the party to proceed by either plaint, action, or information. Having, then, his choice to adopt either course, if he brought an action, and an issue were found against him, he might, in case of misdirection, move for a new trial, and have the case reconsidered. It cannot be contended that if he had chosen to try the same question by information, the form of the record would have precluded him from having the case reviewed, if a verdict had been found against him in consequence of a misdirection. The mere circumstance, therefore, of the action being brought in a civil or a criminal form, ought not to weigh with the Court. An indictment for non-repair of a highway is in the nature of a civil remedy, its true object not being punishment, but the ascertaining and enforcing of a right. The greatest inconvenience would result from holding that a new trial could not be granted in such a case, where the question was of a special liability to repair. A parish, being indicted, might plead that *J. S.* was liable, *ratione tenuræ*, and the jury, under an erroneous direction, might find for them upon that plea. *J. S.* might then be indicted as liable *ratione tenuræ*; and the Judge who tried that case might give such a direction to the jury, upon the same evidence, that the party would be acquitted. If no new trial can be had after acquittal on any indictment, neither verdict could be disturbed. A verdict of not guilty on an indictment,

indictment, charging an individual with a prescriptive obligation, discharges him from that obligation, and tends to fix it on the public or on some other party. It would be hard that a civil right should be thus shifted, and the aggrieved party deprived of the assistance which this Court renders in other civil cases, by a mere technical adherence to the rules of the criminal law. (He then proceeded to contend, that there had been a misdirection in this case; and also that the documentary evidence had been improperly rejected.)

1833.

THE KING
against
SUTTON.

DENMAN C.J. Upon consideration of all the points that have been raised, we are not disposed at present to make the precedent of granting a new trial; but we think the precedent in *Rex v. Wandsworth* (a) may be very properly followed here, by suspending the judgment. Then a new indictment may be preferred; and the points that have arisen may be discussed upon that.

LITLEDALE, PARKE, and PATTESON Js. concurred.

Rule absolute to suspend the judgment (b).

(a) 1 B. & A. 65.

(b) See, as to granting new trials in criminal cases after acquittal, *Rex v. Bennett*, 1 Sira. 101., and some cases there cited.

1883.

Wednesday,
May 29th.

Goss *against* Lord NUGENT.

By agreement in writing *A.* contracted to sell *B.* several lots of land, and to make a good title to them; and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then verbally agreed between the parties, that the vendee should waive the title, as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted.

In an action brought by the vendor to recover the remainder of the purchase-money, the declaration stated that the defendant agreed to deduce a good title to all the lots except one,

and that the vendee discharged and exonerated him from making out a good title to that lot, and waived his right to require the same:

Held, that oral testimony was not admissible to shew the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing; and by the statute of frauds, in every action brought to charge a person on a contract for the sale of lands, the agreement must be in writing.

DECLARATION stated, that, on the 13th of *August* 1830, the plaintiff was about to expose for sale, by public auction, fourteen lots of freehold land, upon the following, among other, conditions: — "That the purchasers should pay down immediately, into the hands of the auctioneer, a deposit of 15*l.* per cent on the purchase money, and should sign an agreement for the payment of the remainder on the 29th of *September* then next; that the vendor, at his own expence, should deliver to each purchaser, or his solicitor, an abstract of the title of the property sold, and should deduce a good title thereto; and upon the purchaser's payment of the remainder of the purchase money, and complying with those conditions, the vendor should, at the purchaser's expence, convey his lot to, or as directed by him." Averment, that, before the land was exposed to sale, by a certain agreement between the plaintiff and the defendant, the plaintiff, in consideration of 80*l.* paid by the defendant at the time of the signing the agreement, and of the further sum of 370*l.*, to be paid by him on the 29th of *September* then next, agreed to sell, and the defendant agreed to purchase, the same land, under the conditions of sale as near as might be,

OR

or such of them as were then, under the said agreement, capable of taking effect. The declaration then stated mutual promises to perform the agreement and conditions of sale, and averred that the plaintiff delivered an abstract of the title to the property so sold, and deduced a good title thereto, and had always been ready to convey, &c. Breach, non-payment of 370*l*. The second count differed from the first in stating, "that the plaintiff delivered an abstract of the title to the land, and made out a good title to all the land excepting thirty-five feet thereof, and that after making the agreement, the defendant discharged and exonerated the plaintiff from making out or deducing any other title to the last-mentioned part of the land, and waived his right to require the same under the conditions of sale and agreement. Plea, general issue.

At the trial before *Gaselee J.*, at the *Buckingham Spring* assizes, 1832, it appeared that the plaintiff having advertised the property in question for sale by public auction, the defendant agreed to purchase it by private contract, agreeably to the printed conditions of sale. The memorandum of agreement, which was annexed to the conditions of sale, was as follows: — "*Thomas Goss*, in consideration of 80*l*. paid to him by *George Lord Nugent* at the time of signing this agreement, and of 370*l*. to be paid to him on the 29th day of *September* next, doth agree to sell to *G. Lord Nugent*, and *G. Lord Nugent* agrees to purchase of *T. Goss* all the ground and premises described in the particulars of sale hereunto annexed, as near as may be, or such of them as are now under the present agreement capable of taking effect." The fifth condition of sale was as follows: — "That the vendor, at his own expense, shall

5838.

Goss
against
Lord Nugent.

1833.

Goss
against
Lord Nugent.

shall deliver to each purchaser or his solicitor, an abstract of the title to the property sold, and deduce a good title thereto, and upon the purchaser's payment of the remainder of the purchase-money and complying with these conditions, the vendor shall, at each purchaser's expense, convey his or her lot or lots to or as directed by him." The agreement was drawn up at the request of the defendant, by *Hatten*, the plaintiff's attorney. The defendant was afterwards informed by *Hatten*, that as to one lot of thirty-five feet, there was a defect in the title. The defendant said he would accept the title notwithstanding that defect; and possession of the whole was delivered to him. The vendor was called upon by the defendant's solicitor, to furnish an abstract of title, and he delivered one on the 10th of *September*. In *November* the defendant's solicitor objected to the title as to the thirty-five feet. *Hatten* said the objection had been waived. The defendant then refused to complete the purchase. It was objected that oral evidence of the defendant's waiver of his right to have a good title made out to the thirty-five feet, was not admissible, because the action being brought to charge him on a contract for the sale of land, the statute of frauds (29 Car. 2. c. 3. s. 4.) required the whole agreement to be in writing. The learned Judge received the evidence, and finally directed the jury to find for the plaintiff if they thought there had been a waiver by the defendant of the right in question. The jury having found for the plaintiff, leave was given to the defendant to move to enter a nonsuit upon the point as to the admissibility of the oral testimony. A rule nisi having been obtained for that purpose,

Kelly

Kelly in last *Easter* term shewed cause (a). It may be conceded, that oral evidence of any thing which occurred at the time when the written contract was entered into cannot be received to vary it, *Meres v. Ansell* (b); but here, the agreement in writing not being under seal, is a mere parol agreement, and being executory, it might, without any violation of the common law rule, (that every contract ought to be dissolved by matter of as high a nature,) be discharged and abandoned, before breach, by a subsequent unwritten agreement. The only question, therefore, is, whether, by the statute of frauds, evidence of such unwritten agreement is excluded. That statute contains no provision for the dissolution of agreements. It will be said, this agreement being one concerning an interest in land, is within the fourth section, which enacts, that no action shall be brought to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing. Here, the plaintiff in the second count declares upon the written agreement, and alleges that the defendant waived his right to insist on a good title to part of the land. [*Parke J.* Assuming that a written contract concerning land may be wholly waived by a new agreement not in writing; here there has not been a waiver of the entire agreement, but of a part of it only, and the effect of that waiver is to substitute for the original contract a new one, which is to be proved partly by matter in writing, and partly by oral testimony.] The original agreement consists of two parts: the first is for the sale of land; the second is for making a good title

1833.

Goss
against
Lord Nugent.

(a) Before *Denman C. J.*, *Littledale and Parks J.*

(b) 3 *Wils.* 275. and in *Hayne v. Hare*, 1 *H. Bl.* 659.

1833.

Goss
against
Lord Nugent.

to that land. The agreement, so far as it is a contract for the sale of land, cannot be altered by matter not in writing; but so far as it relates to making a good title to the land, it may be so varied. Here, the verbal alteration does not in any degree vary what is to be done by either party. The same land is to be conveyed, the same extent of interest, at the same time, and the same price is to be paid. The oral evidence, therefore, is offered, not to vary the original agreement, but to shew that it was discharged in part. There are cases, even within the scope of the statute of frauds, where parol evidence is admissible to shew a dispensation with the performance of part of the original contract; such as an agreed substitution of other days than those stated in the contract for the delivery of goods sold, *Cuff v. Penn (a)*, *Warren v. Stagg (b)*. There is no difference in principle between a waiver of title, and a waiver of the time for completing the contract.

Storks Serjt. and *Follett*, contra. A written contract concerning an interest in land cannot be abandoned or discharged by matter not in writing; but even if it may, it cannot be altered by parol. In *Buckhouse v. Crossby (c)*, to a bill filed by a purchaser for a specific performance, the vendor of lands objected that the contract had been discharged by parol. Lord *Hardwicke* said, "an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract," and he would not decide that it might be discharged by parol; and in *Bell v. Howard (d)* he said, "that it was certain

(a) 1 M. & S. 21.

(b) Cited in *Little v. Holland*, 5 T. R. 591.

(c) 2 Eq. Ca. Abr. 32. pl. 44.

(d) 9 Mod. 305.

that

that an interest in land could not be parted with, or waived by naked parol without writing." In *Parteriche v. Powlet* (a), the same noble and learned Judge said, that "to add any thing to an agreement in writing, by admitting parol evidence, which would affect land, is not only contrary to the statute of frauds and perjuries, but to the rule of common law before that statute was in being." Assuming, however, that an agreement for the purchase of land may be wholly waived and discharged by parol, it cannot be varied. In *Price v. Dyer* (b), where the plaintiff prayed a specific performance of an agreement for a lease under which the plaintiff had taken possession, and afterwards the parties had mutually abandoned the terms of the written agreement, and made another agreement by parol, as to the duration of the term, the rent and other particulars; Sir *W. Grant*, Master of the Rolls, said, "that the waiver, spoken of in the cases, was an entire abandonment and dissolution of the contract, restoring the parties to their former situation. No such thing was, for a moment, in contemplation of these parties. All that they, at any time, meant, was to add to or to modify the terms of the original agreement." So, in this case, the parties never intended entirely to abandon the written contract, but merely to modify one of the terms of it as to part of the property. The effect of the oral evidence is not to shew that the written contract was put an end to, or that the parties were restored to their original situation, but to substitute a different contract, which must be proved partly by writing and partly by oral evidence. The contract in writing was to make a good title to all the lots; the substituted contract is to make a good title to all but one. The result of the authorities as to a

1833.

Goss
against
Lord Nugent.

(a) 2 Atkyns, 383.

(b) 17 Ves. jun. 556.

parol

1833.

—
Goss
against
Lord Nugent.

parol variation, is stated by Mr. *Sugden* in his *Law of Vendors* (a), to be, that evidence of it is totally inadmissible at law. [*Parke J.* In *Cuff v. Penn* (b), and some other cases relating to contracts for the sale of goods of the value of 10*l.*, (which the statute of frauds requires to be in writing,) it has been held that the time (in which, by the agreement in writing, the goods were to be delivered,) might be extended by a verbal agreement; but I never could understand the principle on which those cases proceeded, for the new contract, to deliver within the extended time, must then be proved partly by written, and partly by oral, evidence.

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. By an agreement in writing, the plaintiff contracted to sell the defendant several lots of land for the sum of 450*l.*, and to make a good title to them; and 80*l.* was paid to him as a deposit. It was afterwards discovered, that, as to one of the lots, a good title could not be made; and it was then subsequently agreed by the defendant, that he would waive the necessity of a good title being made as to that lot; and the plaintiff afterwards delivered possession of the whole of the lots to the defendant, which he accepted, but now refuses to pay the remainder of the purchase money, and he relies on the objection to the title.

By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of

(a) 8th edit. 142.

(b) 1 M. & S. 21.

preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.

1833.

Goss
against
Lord Nugent.

And if the present contract was not subject to the controul of any act of parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained.

But the statute of frauds has made certain regulations as to contracts for the sale of lands; and by the 29 *Car. 2. c. 3. s. 4.* it is enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

It is to be observed, that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the act

1833.

Goss
against
Lord Nugent.

which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion upon that point, as this is not a waiver and abandonment of the whole written agreement, but only a part of it; and the question is, what is the effect of that?

It may be said by the plaintiff, that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed, there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid, and that it is only an abandonment of a collateral point.

But we think the object of the statute of frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only.

But, in the present case, the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, is not a contract entirely in writing; and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may, in some instances, better not be conveyed at all; but our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon the

the

the general effect and meaning of the statute of frauds, and that the contract now brought forward by the plaintiff is not wholly a contract in writing.

We do not say that verbal evidence may not be given of customs and usages applicable to the subject matter of the written contract where the contract is silent; that has been done in a great variety of instances.

Whether the plaintiff may not have relief in a Court of equity, we give no opinion; it would be for the Court to decide upon the case which should be brought before them. There have, however, been some cases at law on contracts within the statute of frauds, where verbal evidence has been allowed: *Warren v. Stagg*, cited in *Little v. Holland* (a), *Thrush v. Rooke* (b), and *Cuff v. Penn* (c). These were cases where the time for the performance of the contract had been enlarged by a verbal agreement, and they were decided on the ground that the original contract continued, and that it was only a substitution of different days of performance. It is not necessary to say whether these cases were rightly decided; if they were so, still the present is a different case, for here, without doubt, the terms of the original contract were varied.

Rule absolute.

(a) 3 T. R. 591.

(b) 1 Esp. N. P. C.

(c) 1 M. & S. 21.

1855.

~~_____~~
Goes
against
Lord Nugent.

1838.

ENGLEHEART *against* EYRE and Another.

In declaring on a judgment signed in vacation, on certificate by the Judge at nisi prius for immediate execution (under 1 W. 4. c. 7. s. 2.) the day of signing judgment should be stated according to the fact, and not laid as of the preceding term.

But it is enough to set out the judgment as it appears on the record; the certificate need not be stated.

The *postea*, however, in such a case, should be so framed, that the judgment may appear to be warranted by the previous finding of a jury.

But when on *nul tiel* record pleaded to debt on recognizance of bail, the *postea* shewn to the Court proved erroneous in this respect, leave was given to amend it; the defendants also having leave to plead *de novo*.

Semble, that the Court would have allowed the error in the declaration to be amended, without permitting the defendants to plead again.

THIS was an action on a recognizance of bail. The defendants pleaded, first, as to the recognizance, *nul tiel* record; and, secondly, as to the judgment against the principal, the same plea. Issue being joined on both, and a day given for production of the records, the same were accordingly produced in Court on the last day of *Easter* term, after which the Court, upon motion, made an order, that unless cause were shewn to the contrary on the second day of this term, judgment should be entered for the defendants. This rule was granted on the following ground: — The action against the principal was tried on the 5th of *February*, and the Judge certified for execution on a day in the same vacation, pursuant to 1 W. 4. c. 7. s. 2.: judgment was therefore signed in that cause on the 15th of *March*; but the declaration in the present action against the bail stated the judgment to have been recovered in *Hilary* term, according to the former practice, by which a judgment signed in vacation was treated as relating to the previous term: and the Court thought, on reference to the statute, that the day of signing judgment, under the present circumstances, ought to be stated according to the fact. — A summons was taken out for the purpose of amending the declaration, and the parties attended before *Taunton* J., who gave leave to amend on pay-

ment

ment of costs, and the declaration was altered accordingly. On the second day of this term,

1838.

ENGLISHHEART
against
EYAL.

Thesiger, in pursuance of the direction of the Court in the last term, appeared (*May 23d*) to shew cause against judgment being entered for the defendants; and the declaration, as amended, and also the records of the recognizance and judgment, were again produced.

Mansel, *contra*, applied to the Court that the order of *Taunton J.* might be rescinded, and the defendants have judgment. The amendment ought not to have been allowed. The bail are entitled to benefit by the error in the proceeding against them, and should be at liberty to render their principal, *Stevenson v. Grant (a)*. If not, the defendants should at least be at liberty to plead *de novo*. [*Parke J.* This is a technical objection, and since the decision referred to, the Court have often held it to be discretionary in them to allow an amendment. The present case is a favourable one for granting such permission, since the difficulty arises under a new act of parliament. The defendants are now praying judgment. What are the objections to the record as amended?] The declaration should have stated the special circumstances, to shew that the judgment was conformable to 1 *W. 4. c. 7. s. 2*. The certificate for immediate execution should have been stated.

LITLEDALE J. That is not necessary. It is the authority to the officer for entering up judgment, but it need not be set out in declaring.

(a) 2 *New Rep.* 103.

1833.

ENGLISHART
against
EYAL

PARKE J. It is quite clear, on referring to sects. 2. and 3. of the statute, that no such statement is necessary. Before this act passed, the allegation of a judgment signed out of term would have been erroneous on the face of it; but now the Court will take notice that a judgment may be signed in vacation under the statute.

PATTESON J. It is enough to set out the judgment as it is.

LITLEDAL J. On referring to the record, it appears that the *postea* is of the 15th of *April*, and the return of the *distringas juratores* is of that day; whereas the judgment is signed on the 15th of *March*. The *postea* ought to be so framed, that the judgment should be warranted by the finding of a jury. At present it is not so.

The Court, upon this objection, gave *Thesiger* leave to amend the *postea* on payment of costs: and they also gave leave to the defendants to plead *de novo*.

Rule accordingly (*a*).

(a) The *postea* was amended, and the defendants having pleaded several matters without leave of the Court, the plaintiffs signed judgment. The amended *postea*, after stating the *venire, vicecomes non misit breve*, &c. in the usual way, went on as follows: — “Afterwards the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them before our lord the King at *Westminster*, until *Monday* the 15th day of *April* next coming, unless the Right Honourable Sir *Thomas Denman*, Knight, his Majesty's Chief Justice assigned to hold pleas in the Court of our said lord the King, before the King himself, shall first come on *Friday* the 1st day of *February* next coming, at *Westminster Hall*, in the county of *Middlesex*, according to the form of the statute in such case, &c. for default of the jurors, because none of them did appear. At which last-mentioned day, and before the said 15th day of *April*, to wit, on the said 1st day of *February*, in the third year, &c., at the day and place last aforesaid, comes the Honourable

Sir

1833.

 ENGLEHEART
 against
 EYAR.

Sir John Patteson, Knight, one of the justices of our said lord the King, assigned to hold pleas in the said Court of our said lord the King, before the King himself, in the absence of and in the place and stead of the said Sir Thomas Denman, Knight, the Chief Justice aforesaid; and at the same last mentioned day and place, before the said Sir John Patteson, Knight, the said Justice, Thomas Denman, Esquire, being associated unto the said Justice, according to the form of the statute in such case made and provided, come as well the above named plaintiff *N. B. E.*, as the above named defendant *N. D.*, by their respective attorneys also above mentioned, and the jurors of the jury, whereof mention is above made, being summoned, also come, who to speak the truth of the matters aforesaid being chosen, tried, and sworn, as to the first issue within joined between the parties aforesaid say " (Verdict for the plaintiff on both issues. Damages 22*l.* 7*s.* 10*d.* and 40*s.* costs.) " And thereupon the said Sir John Patteson, Knight, the Judge before whom in the absence of and in the place and stead of the said Sir Thomas Denman, Knight, the said Chief Justice, the said issues were tried in form aforesaid; and before the end of the sittings of *Nisi Prius* at which the said cause was tried, to wit, on the 5th day of *February*, in the year of our Lord 1833, at *Westminster* aforesaid, certified under his hand, upon the back of the record of and in the said action, according to the form of the statute in such case, &c. that he was of opinion that execution ought to issue on *Tuesday* the 5th day of *March* then next, for the sum found by the said verdict; and, thereupon, afterwards and after the granting the said certificate, to wit, on the 18th day of *March*, in the third year of the reign of our said lord the King, before our lord the King at *Westminster*, comes the said *N. B. E.* the plaintiff by his attorney aforesaid, and prays judgment: and that the damages, costs, and charges by the jurors aforesaid in form aforesaid assessed, and also his costs and charges by him about his suit in this behalf expended of increase, may be adjudged to him, &c. Therefore it is considered by the Court of our said lord the King, before the King himself, according to the form of the statute in such case made and provided, that the said *N. B. E.*, the plaintiff, do recover against the said *N. D.*, the defendant, his said damages," &c.

1833.

Monday,
May 27th.

COOMBS and Another, Assignees of SAMUEL
COOMBS, a Bankrupt, *against* BEAUMONT.

A steam engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 G. 4. c. 16. s. 72., nor had the bankrupt the actual or apparent ownership.

TROVER for steam-engines, other engines, trams, tram waggons, carts, waggons, weighing-machines, &c. Plea, not guilty. At the trial before Gurney B., at the *Monmouth* Summer assizes 1832, the following appeared to be the facts of the case:—The bankrupt, on the 31st of *May* 1825, became tenant under a lease granted to him and his partners by *Philip Jones* of a farm called *Gelly Deg Farm*, and coal mines under it. There was a proviso that an inventory and valuation should be made of the workmen's tools, moveable engines, and machines, and all the timber and other materials, being the property of *P. Jones*, then being in and upon the collieries; that the lessees should have the full use and enjoyment of all and singular the said stock and moveable engines and materials during the continuance of the demise; and that, at the expiration or sooner determination of the term, the said stock, workmen's tools, and moveable engines and materials, together with all improvements, additions, and reparations which should be made of, in, or to the same by the lessees, their executors, administrators, or assigns, at any time during the said term, should be delivered up to *P. Jones*, his executors, administrators, or assigns, for his and their own use and benefit. Proviso for re-entry, if the rent should be in arrear thirty days, or in case the lessees should become bankrupt or insolvent, or any judgment should be entered

entered up and execution issue thereon against them. *Philip Jones* afterwards died, and his interest vested in *Mrs. Mary Jones*.

1833.

COOMBS
against
BRAUDRON.

It being deemed advantageous for the lessees to obtain a lease of the coal under an adjoining estate called the *Bryn*, the property of one *John Jones*, a verbal agreement was entered into for a lease of that coal, under which agreement the lessees were permitted to take possession; and it was provided by the agreement, that any erections or machinery to be put up by them should belong to the landlord at the end or determination of the term, and that in all respects the lease should conform to that previously granted. It was also provided that *Mr. Jones* should contribute to the erection of the engine and the sinking of a new pit. On the 7th of *August* 1829, a memorandum of agreement was executed by the lessees and the defendant as the agent of *John Jones*, whereby it was agreed that the steam-engine, machinery, pumps, pipes, castings, chains, tram plates, and other materials in and about the pits the lessees were then sinking upon part of the *Great Penllwyn Farm*, near the *Bryn*, and all additions which should be thereafter made to the same were then, and should at all future times, be held as the property of *John Jones*, subject to the use of them, on the part of the lessees, for raising coal from the said part of *Penllwyn Farm*, upon all the terms, conditions, and covenants contained in the lease of *Gelly deg Colliery*, which they (the lessees) held under his mother *Mrs. Mary Jones*. All the lessees except *Coombs*, having failed, the work was carried on by him alone: he committed an act of bankruptcy on the 7th of *February* 1831, and a commission issued against him. The defendant was the agent both of *John Jones*

1833.

 COOMBS
 against
 BEAUMONT.

Jones and Mrs. Mary Jones, and had taken possession of the stock, machinery, &c. on their behalf. It was proved to be a well known usage to let old coal mines ready furnished, but virgin collieries always without furniture.

It was contended for the plaintiffs, that they were entitled to recover the value of the whole stock, as having been in the reputed order and disposition of the bankrupt at the time of his bankruptcy. On the other hand, it was argued for the defendant, that the *Bryn Colliery* and the *Gelly deg Colliery* were one, and that the case fell within *Storer v. Hunter* (a). The learned Judge told the jury that the usage proved of demising machinery with old collieries, the landlord retaining the right to it on the determination of the tenant's lease, rebutted the presumption of reputed ownership which would otherwise arise from the tenant's possession of the articles and machinery at the *Gelly deg Colliery*; but this usage did not apply to the *Bryn Colliery*, which was only opened in 1828 and therefore as to the machinery and other articles there, at the time of *Coombs's* bankruptcy, there was nothing to rebut the presumption of reputed ownership arising from the possession by the bankrupt; and the jury found first, that at the time of the bankruptcy, the bankrupt was the reputed owner of the machinery bought, and brought to the *Bryn*, including the steam-engine; secondly, that he was not the reputed owner of what was brought from the *Gelly deg* to the *Bryn*, nor of what remained at the *Gelly deg*. A verdict was then entered for the plaintiff, the amount to be fixed by an

(a) 3 B. & C. 368.

arbitrator, but the learned Judge reserved leave to the defendant to move to reduce the verdict by the amount of the value of the steam-engine.

1838,

 COOMBS
 against
 BEAUMONT,

A rule nisi was obtained in last *Michaelmas* term for entering a nonsuit, on the ground that all the machinery at the *Bryn* belonged to the landlord; or to reduce the damages by the amount of the value of the steam-engine.

The *Solicitor-General* and *Maule* now shewed cause. The learned Judge was clearly right as to the moveables. (To this the Court assented.) Then, as to the steam-engine, that would pass to the assignees as part of the property of the bankrupt, because it was a fixture put up for trading or manufacturing purposes, and removable by the tenant at the end of his term, *Lawton v. Lawton* (a). At all events it was a tenant's fixture, and then it was in the order and disposition of the bankrupt within 6 G. 4. c. 16. s. 72. In *Ex parte Austin* (b) Sir George Rose said, that where fixtures are capable of removal by an outgoing tenant, without injury to the freehold, they are in the order and disposition of such tenant within the bankrupt law.

Ludlow Serjt., Richards, and Whately in support of the rule. According to *Horn v. Baker* (c), (recognised and acted on in the late case of *Clark v. Crownshaw* (d),) the steam-engine at the *Bryn* did not pass to the assignees. There it was held that certain stills fixed to the freehold, which had been leased, together with a

(a) 3 Atk. 13.

(b) 1 Deacon & Chitty's Rep. 207.

(c) 9 East, 215.

(d) 3 B. & Ad. 884.

1893.

COOMES
against
BRAUMONT.

distill house, to the bankrupt, did not pass to his assignees under the description of goods and *chattels* within the 21 *Jac.* 1. c. 19. s. 11. In that case the Court took a distinction between those articles and certain other utensils which were not fixed, but merely stood upon frames or horses, which they held would pass to the assignees under the words of the statute. In *Storer v. Hunter* (a) it was held that the possession by a tenant of certain fixed machinery, which he had taken on lease together with some collieries, and of new machinery which he had erected to replace some of the old, was not to be considered a reputed ownership within the meaning of the statutes of bankruptcy either during the term, or, after he had forfeited it, between a judgment in ejectment by his landlord and the execution of the writ of *habere facias possessionem*. [*Parke J.* The Court there relied on a usage which was proved of demising the machinery with the collieries, the landlord retaining a right to it on the determination of the tenant's lease, for that usage rebutted the presumption of a reputed ownership arising from the possession of the articles. In this case the evidence is, that there is no such usage as to a virgin colliery like the *Bryn*.]

DENMAN C. J. As to the steam-engine, I think this case must be governed by *Horn v. Baker* (b), and that the engine does not pass to the assignees.

LITLEDALE J. I see no reason to deviate from the rule laid down in *Horn v. Baker*. The steam-engine is part of the freehold, and does not come under the de-

(a) 3 B. & C. 368.

(b) 9 East, 215.

scription of *goods and chattels*. Independently of that, property affixed to the freehold is not within the intent of the statute, because the possession of such property does not create a visible ownership in the bankrupt, so as to procure him credit.

1839.

 COOMES
 against
 BEAUMONT.

PARKE J. The steam-engine if affixed to the freehold clearly does not pass to the assignees, because it does not come within the description of goods and chattels in the 6 G. 4. c. 16. s. 72. This was determined in the case of *Horn v. Baker* (a), and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removeable between landlord and tenant, and such as would not. But then it is said, that this steam-engine vested in the assignees as part of the property of the bankrupt. I think it was not his property; for it was agreed on the 7th of August 1829, between the lessor and lessee, that the steam-engine, machinery, &c. then were, and should at all future times be held as the property of the lessor, subject to the lessee's right to use them. The steam-engine, therefore, was the absolute property of Jones the landlord, and the bankrupt had the mere right to use it during the term.

PATTESON J. concurred.

Rule discharged as to entering a nonsuit; absolute for reducing the damages.

(a) 9 East, 215. See *Troppes v. Harter*, 5 Tyrwhitt, 603.

1833.

Wednesday,
May 29th.

CARR, Administratrix of JOSEPH WALKER,
against ROBERT ROBERTS.

Declaration stated, that by indenture between defendant and *J. W.*, reciting that defendant for certain considerations had agreed to pay off certain mortgages and debts of *J. W.*; defendant covenanted to and with *J. W.* to save, protect, defend, keep harmless, and indemnify *J. W.*, his heirs, executors, administrators, &c., from the payment of the said debts, and from all actions, &c. in respect of them.

Breach, that 500*l.* of an annuity, for payment of which *J. W.* had bound himself, his heirs, executors, and administrators, became in arrear, and remained so after *J. W.*'s death; and that defendant did not pay the same, nor protect or indemnify *J. W.*, his executors and administrators, &c. by reason whereof the annuity bond became forfeited, and the grantee recovered against the plaintiff, administratrix of *J. W.*, and had judgment for 20*l.* the amount of assets admitted to be in hand, and for the residue, judgment of assets quando:

Held, that, looking to the whole of the deed declared upon, there appeared a covenant by the defendant, not only to indemnify, but to pay the debt.

Semble, per *Parks J.*, and held by *Patteson J.*, that if the express covenant to protect and indemnify had stood alone, a sufficient breach of that covenant appeared. (*Little-dale J.* dubitante.)

Held, that the plaintiff might recover the whole arrears, for which she was liable, as administratrix, to the grantee of the annuity, though she had only paid a part.

COVENANT. The declaration stated, that *Joseph Walker* the intestate, in his lifetime, in consideration of 600*l.*, became bound to one *Anne Smith* in the penalty of 1200*l.* for the payment by him the said *J. W.*, his heirs, executors, and administrators, of an annuity of 100*l.* to the said *Anne* for the term of her natural life. That afterwards, by indenture of bargain and sale, made between the intestate of the first part, the defendant of the second part, and *William Roberts* and *John Roberts* of the third part, reciting that the said *Joseph Walker* was seised of, and entitled to, certain freehold and other premises, described in a schedule to that indenture, but that the same were subject to divers mortgages, incumbrances, and payments; and that the said *J. W.* was indebted to divers persons in certain sums in another schedule also enumerated; and that *J. W.* had proposed to convey the said premises to the defendant, and that he should, in consideration thereof, pay the said mortgages and sums of money, and also an annuity of 200*l.* to *J. W.* for his life, which proposal the defendant had agreed to

comply

comply with : — It was witnessed, that, in pursuance of the agreement, &c., *J. W.* granted, bargained, sold, and confirmed to the defendant the said freehold premises (subject to the said incumbrances as far as they were affected by them), to the defendant in fee; and also bargained, sold, assigned, transferred, and set over the leasehold premises to him, his executors, &c., for all the terms and interests which *J. W.* had therein, subject as before. And the defendant covenanted “that he the said defendant, his heirs, executors, or administrators, should and would from time to time, and at all times thereafter, *well and sufficiently save, protect, defend, keep harmless and indemnified* the said *Joseph Walker*, his heirs, executors, administrators, and assigns, and his and their goods and chattels, estates, and effects whatsoever and wheresoever, from and against the payment of the same several sums of money mentioned in the schedule to the said indenture, or any of them, and from and against all actions, suits, claims, or demands, for or upon account of the same or any of them.” The declaration then averred, that the annuity of 100*l.* to *Anne Smith* was mentioned in the second schedule to the indenture, and was, and from thenceforth continued to be, a sum of money, against which the defendant by the said indenture so covenanted to save, protect, defend, keep harmless, and indemnify the said *J. W.*, his executors, &c. : that the defendant by virtue of the said bargain and sale, and of the statute for transferring uses into possession, became seised and possessed of the above-mentioned premises respectively: that afterwards, to wit, in *December 1829*, in the lifetime of *Anne*, 500*l.* of the annuity became, and was, and still is, in arrear : that, in *November 1829*, the intestate

1833.

 Carr
 against
 Roberts.

1833.

Case
against
Romney.

testate died, and the plaintiff took out administration, of all which premises the defendant had notice: yet the defendant did not, nor would pay, or cause to be paid, the said arrears of the said annuity, to wit, the sum of 500*l.*, or any part thereof, to the said *Anne*, or well and sufficiently save, protect, defend, keep harmless, and indemnified the said *Joseph Walker*, his executors or administrators, and his and their goods, estates, and effects from and against the payment of the said sum of money so mentioned in the said schedule, and of, from, and against all actions, suits, claims, and demands for or upon account of the same, but wholly neglected and refused so to do, and by reason and on account thereof the said bond became forfeited, and an action accrued thereon to the said *Anne* against the plaintiff as administratrix: that the said *Anne* thereupon sued the present plaintiff as such administratrix, and obtained judgment for 1200*l.*, and 7*l.* damages; the sum of 20*l.*, part thereof to be levied of the goods acknowledged by the present plaintiff to be then in her hands to be administered, and the rest of assets quando acciderint: and that the present plaintiff, as administratrix, was obliged to pay the said 20*l.*, and incurred costs to the amount of 50*l.* in defending the action. The defendant pleaded, 1st, That he did pay the arrears, and did indemnify, &c. 2dly, That if the plaintiff was damnified, it was of her own wrong. 3dly, Ne uncques administratrix. The plaintiff on a former trial obtained a verdict for 34*l.*, but on motion for an increase of damages, or for a new trial, the latter was granted (a). At the second trial before *Denman C. J.*, at the *Middlesex* sittings after *Michaelmas* term 1832,

(a) 2 B. & Ad. 905.

the plaintiff had a verdict for 534*l.*; but *Coltman*, for the defendant, obtained leave to move that this verdict might be reduced to 34*l.*, on the ground that the covenant declared upon was only to *indemnify*, and it did not appear that the plaintiff had been actually damaged to a greater amount than 34*l.* A rule nisi having been granted,

1833. -

Case
against
Roberts.

The *Solicitor-General* and *White* now shewed cause. The plaintiff is entitled to recover the whole arrears of the annuity. It is contended on the other side, that the intestate's estate being insolvent (which is assumed as the consequence of the assignment made by him), the administratrix cannot be compelled to pay those arrears, and, consequently, has no interest upon which the present action can be grounded, except as to the sum of 34*l.* That is assuming that her only claim is to indemnity for loss actually sustained. But the defendant's covenant was, in effect, to pay, as well as to indemnify. The Court will collect this from the whole of the contract between the parties, as set out in the instrument declared upon. So in *Sampson v. Easterby* (a), an indenture of demise recited that the lessee had entered by virtue of a former agreement, had pulled down a smelting-mill on the premises, and had engaged to build a new one; and in a subsequent part of the deed, the lessee covenanted to keep in repair the said mill engaged to be erected by the defendant; but there was no direct covenant to *build* the mill. The Court, however, held, that the recital of an agreement to build, followed by the express covenant to

(a) 9 B. & C. 505.

1833.

CARR
against
ROBERTS.

maintain the mill to be erected, made a sufficient covenant in law to erect the building; and they relied upon *Saltoun v. Houstoun* (a), where the same mode of construction was adopted. [Parke J. Any words of the deed by which you can establish an agreement and connect it with the parties, will make a covenant.] Besides, the administratrix is damnified, within the meaning of the covenant to indemnify by the judgment of assets quando (b).

Coltman contra. It cannot be collected here that any thing more was intended between the parties than an indemnity to the testator against any mischief that might happen to him in respect of the annuity and other debts. The plaintiff herself has so treated it; for the declaration, after setting out the prior parts of the deed, states that the defendant *did thereby* covenant "to indemnify;" not to pay the debts. In *Saltoun v. Houstoun* (a) the declaration stated the defendants' covenant according to the effect which the plaintiffs contended it ought to have; and the deed, when set out on oyer, was held to bear out that statement. Here, if the deed had been set out in its own words, it might have been contended that the effect was that which the plaintiff now seeks to give it; but she has not done so, and has stated the effect differently in her pleading. Could it be contended that this action would have been maintainable before the plaintiff was sued? [Parke J. It might have been so contended, if the time for payment of the annuity had expired and the defendant had not paid it.

(a) 1 Bingham. 433.

(b) *Littledale* J. observed, that the judgment as stated in the declaration appeared imperfect, as there ought to have been an assessment of damages under the statute.

The covenant is not to indemnify merely, but to "save, protect, defend, and keep harmless." It is not every covenant to a testator or intestate, not even every personal covenant, that can be sued upon by an executor or administrator. There must be a damage to the personal estate. Non constat here that the personal estate would be charged. In the deed granting this annuity, the intestate charges not only his administrators but his heirs; and the defendant's covenant is to indemnify the heirs as well as the administrators. It would be hard, therefore, if the defendant were liable to the administratrix before she had actually paid the arrears; for if she recovers from him, she may keep the money, or apply it to other purposes, and in the meantime the annuitant may have recovered from the heir, who may then likewise proceed against the defendant for an indemnity.

1833.

 CASE
 against
 ROBERTS.

LITLEDAL J. (a) I am of opinion that the plaintiff is entitled to recover the whole sum claimed. (His Lordship then read the parts of the declaration setting out the annuity deed, and the recital in the indenture between the plaintiff and defendant, of an agreement by the latter to pay the mortgages and sums scheduled.) So far it appears that the defendant had agreed to pay the debts mentioned in the schedule, of which that in question is one. He then goes on to covenant, that he will at all times "well and sufficiently save, protect, defend, keep harmless, and indemnify," *Joseph Walker*, his heirs, executors, and administrators, against the payment of the sums of money mentioned in the

(a) *Dawson C. J.* had gone to attend the Privy Council.

1833.

CARR
against
ROBERTS.

schedule, and all actions, suits, claims, or demands on account of them. As far as the words of this clause go, if there were nothing more, it might be a doubt whether the plaintiff was entitled to recover more than the 20*l.* and the costs incurred by the plaintiff; but the former part of the instrument clearly shews that there is an agreement, in effect, that the defendant shall take this debt, among others, upon himself. That is, therefore, the defendant's covenant. Then an action is brought against the plaintiff for arrears of the annuity to the amount of 500*l.*, and judgment is given against her. That arises from the defendant not discharging the arrears, as it was his duty to do; and he is bound to put her in a situation to pay that which, by his default, she has become liable to pay. To a certain extent, namely, 20*l.* and her costs, she has been actually damnified. The defendant suffers no prejudice in being called upon to pay the whole amount: it is his duty to pay it; and it makes no difference as to that, whether she applies it in discharge of the debt or not.

PARKE J. The Court, in effect, decided this point when they ordered a new trial on payment of costs; it would else have been nugatory to grant such a rule. There are, in fact, two covenants in this deed;—to pay the debts, and to indemnify the testator and his representatives. I doubt if, upon the second alone, this action was not maintainable, for by that the defendant was bound to protect and save harmless the covenantees. But, at all events, there is a breach of the first covenant, and it is well assigned; and as covenants which relate to the personal estate go (with some few exceptions) to the personal representatives,

it

it is clear that the administratrix in this case was entitled to sue for, and recover, the whole sum demanded. The intestate might, if a judgment for the arrears had been recovered against him; so, therefore, may the administratrix. This case is, in principle, like *Lethbridge v. Mytton* (a).

1839.

 CARR
 against
 ROBERTS.

PATTESON J. The express covenant in this case is not only to indemnify, but to protect; and a sufficient breach of that engagement is alleged, when the plaintiff states that the defendant did not protect the covenantees, and by reason thereof an action was brought, and judgment recovered, against the administratrix, to the extent of all the assets she had. I do not mean, however, that I entertain any doubt as to there being also a breach of a covenant by the defendant to pay the debt. As to the amount of damages, I think the plaintiff is entitled to the whole sum claimed. The argument to the contrary is only this, that if she recovered it, she might not make a proper use of it.

Rule discharged.

(a) 2 B. & Ad. 772. See *Hunley v. Sanderson*, 1 Cro. & M. 467.

1833.

DOE dem. KNIGHT *against* NEPEAN, Bart.

A person who has not been heard of for seven years, is presumed to be dead, but there is no legal presumption as to the time of his death. The fact of his having been alive or dead at any particular period during the seven years, must be proved by the party relying on it.

EJECTMENT for copyhold premises. At the trial before *Taunton J.*, at the *Dorsetshire* Summer assizes, 1832, it appeared that the lessor of the plaintiff claimed the premises by title accruing on the death of *Matthew Knight*. *Matthew* went to *America* in 1807, and was never heard of after that year. The lessor of the plaintiff was then of age. The ejectment was brought in 1832, and the question at the trial was, whether or not this action was barred by statute of limitations, 21 *Jac. 1. c. 16. s. 1. (a)* It was admitted that *Matthew* must be presumed to have died, more than seven years having elapsed since he was heard of. If that presumption were considered as referable to the time when the last intelligence was received of him, the ejectment was brought too late; but if it arose only when seven years had elapsed from the receipt of such intelligence, the action was in time. The learned Judge was of the latter opinion, and directed a verdict for the plaintiff, giving leave to move to enter a nonsuit. In *Easter* term last,

Coleridge Serjt. and *Erle* shewed cause (*b*). It is admitted that the lessor of the plaintiff must prove his title to have originated within twenty years. In this

(a) Which enacts, "that no person or persons shall at any time hereafter make any entry into any lands, &c. but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same."

(b) Before *Denman C. J.*, *Littledale J.*, *Parke J.*

case

case the party on whose death the title accrued, was shewn to have been alive in 1807, and must therefore be presumed to have lived till within twenty years of the bringing of this ejectment; that is, till 1814. One of those conclusions which the law invariably draws from certain premises, and which are called legal presumptions, is the continuance of life in a person once known to be living, till the contrary appear: 2 *Stark. on Ev.* 261., 2d ed. (a), citing *Wilson v. Hodges* (b), where Lord *Ellenborough* refers to *Throgmorton v. Walton* (c) for the same point. The presumption as to this fact has no definite limit except that which has been laid down by analogy to the express provisions of certain acts of parliament (namely, the statute against bigamy, 1 *Jac.* 1. c. 11. s. 2. (d), and the statute 19 *Car.* 2. c. 6. (e),) and which makes the presumption cease after seven years. But for the analogy

1888.

DOE dem.
KNIGHT
against
NEPHEW.

(a) And see p. 681. note n. *Ibid.*

(b) 2 *Eas.* 312.

(c) 2 *Roll. Rep.* 461.

(d) Which provides, that nothing in that act "shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other, by the space of seven years together, in any parts within his Majesty's dominions, the one of them not knowing the other to be living within that time."

(e) Entitled, "An Act for Redress of Inconveniencies by Want of Proof of the Deaths of Persons beyond the Seas or absenting themselves, upon whose Lives Estates do depend." Sec. 2. enacts, "that if such persons for whose lives such estates have been or shall be granted as (in the preamble is) aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for recovery of such tenements by the lessors or reversioners; in every such case the person or persons upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements by the lessors or reversioners, their heirs or assigns, the judges before whom such action shall be brought, shall direct the jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead."

1833.

—
 Doe dem.
 KNIGHT
 against
 NEEHAN.

drawn from these acts of parliament, the present ejection could not be supported at all; or at least it would be for the jury to say whether or not *Matthew Knight* was dead. Referring, then, to these statutes, the effect of the rule to be deduced from them clearly is, that the presumption of life is to be cut down to seven years, but continues till the last moment of that period; and the death cannot (in default of evidence) be carried back to an earlier date. Otherwise it must be contended that the party who was supposed to be living at every point of time till the seven years were complete, must, after that period elapsed, be presumed to have been dead ever since the seven years commenced. In the case of bigamy, indeed, a different reckoning prevails; for if the husband or wife has not been heard of for seven years, a second marriage during that period is presumed to have taken place after the party's death; but that is a supposition in favour of innocence; to conclude otherwise would be presuming a crime, which the law will not do (a). In *Doe dem. George v. Jesson* (b), Lord *Ellenborough* said (speaking of a party who had gone abroad and never since been heard of): "As to the period when the brother might be supposed to have died, according to the statute" (referring to 19 *Car. 2. c. 6.*, and to 1 *Jac. 1. c. 11.*) "the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to shew that he was living at a later period, there was fair ground for the jury to presume that he was dead at

(a) See *Rex v. Twynning*, 2 B. & A. 386.(b) 6 *East*, 85.

the

the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him." There the time of the death was left to the jury; but no objection seems to have been taken on that account. The doctrine of Lord *Ellenborough* in that case was relied upon by the Court in *Doe dem. Lloyd v. Deakin* (a). Where that learned Judge says that the presumption of life "ends at the expiration of seven years," he must be taken to mean that it continues till then. The test of the present case is, whether an ejectment could have been brought on the demise of the lessor of the plaintiff, more than twenty years ago. That would have been within the seven years: the plaintiff therefore would have been non-suited. Can it then be said that this action is barred by the statute, as being brought twenty years after the title first accrued? Suppose a term of seven years had been granted, to commence on the death of *Matthew Knight*. According to the argument that must be used on the other side, the term would commence and expire at the same instant.

Follett, contra. It is not to be presumed that the death took place either at the beginning or the end of the seven years. The fallacy on the other side lies in confounding presumption of the fact of the death with presumption as to the time of the death. When a party has not been heard of for seven years, the fact to be presumed from such negative proof is, that he is dead; but those who found a right upon his having died or been alive at a particular time within the seven

1833.

Doe dem.
Knight
against
NEMAN.

(a) 4 B. & A. 433.

1833.

—
Dox dem.
Knight
against
Nepren.

years, must establish that affirmatively by evidence. Unless *Matthew Knight* was alive within twenty years, the lessor of the plaintiff had no right to demise. Has he then proved that fact? The only conclusion that arises from the evidence is, that at a certain period in 1814 *Matthew Knight* was dead. If the presumption of law were always that the party lived till the end of the seven years, it would, in a great majority of cases, be contrary to the fact. Suppose a legacy were left to *C.* if he survived *B.*, and *B.* went abroad, and was not heard of for seven years: must it, under any circumstances whatever, be presumed that *C.*, unless he lived beyond the seven years, did not survive *B.*? or from what time will the legacy be considered as having become due to *C.*? and may not this be determined "by the general state of facts in the case? In *Norris v. Norris(a)*, where 100*l.* had been left to *Richard Norris*, who went beyond sea, saying he should not return in seven years, and who, at the end of five years, had not been heard of, his brother, at the expiration of the five years, took out administration, and exhibited a bill in Chancery against the executor for the 100*l.*, suggesting that *Richard* was dead; and he obtained a decree for the legacy, giving security for the repayment, if *Richard* should return. There the Court clearly was of opinion, that a party, if not heard of for seven years, might be presumed to have died within that time. Suppose a legacy left to *A.*, then to *B.*, if he survive *A.*—if not, then over to some other: *B.* goes abroad, and is not again heard of; *A.* lives more than six years after. Is it to be presumed that *B.* lived some months longer? Or suppose a

(a) *Reports temp. Finch*, 419. See *Dizon v. Dizon*, 3 Bro. C. C. 510. and Mr. *Belt's* notes.

testator

testator devised to a party, who went abroad, and was not again heard of. If the testator lived nearly seven years after the last tidings were received of the devisee, it must, according to the argument on the other side, be a presumption that the devisee outlived the testator; and such a presumption as this would determine the line in which an estate should pass. In *Rowe v. Hasland* (a), Lord Mansfield, after observing that, in cases of pedigree, it is sufficient to shew that a person has not been heard of for many years, to put the opposite party upon proof that he still exists, goes on to observe, that "what is done on such a trial is no injury to the man or his issue, if he should afterwards appear and claim the estate." If the fact of death be erroneously presumed, the error may be repaired; but not so a wrong presumption as to the time, which may send an estate into a different line of descent.

Many cases have arisen in the equity, common law, and ecclesiastical courts, where it would have been important to settle the time of a death—as, for instance, where persons have been lost in the same ship; but our courts have never recognised any presumption upon this subject. By the *French Civil Code* (b), the presumptions in the case of persons perishing together are precisely laid down, with reference to the ages, and other circumstances; but our law has no such rules. The inference, if any can arise, must be drawn from the particular facts, as in *Broughton v. Randall* (c). *Taylor v. Diplock* (d), *Mason v. Mason* (e) in the goods

1833.

—
Dor dem.
KNIGHT
against
NEPHEW.

(a) 1 W. Bl. 405.

(b) Liv. III. tit. 1. c. 1. The articles alluded to are cited in a note to *Mason v. Mason*, 1 Mer. 310.

(c) Cro. Eliz. 503. Cited 2 Bac. Abr. 721.

(d) 2 Phillimore's Rep. 261.

(e) 1 Mer. 308.

1833.

—
Doe dem.
Knight
against
NEPEAN.

of *Selwyn* (a) are instances of the manner in which such cases have been treated by the Courts. They have never decided upon mere presumption, but have considered that the fact of survivorship was to be proved by that party whose claim accrued by it. A similar question of this kind arose in the case of a woman and her housekeeper, who were murdered at the same time at *Portsmouth*, the mistress having left the housekeeper the whole of her property. [*Parke J.* The difficulty of proof there would operate against the person who claimed under the servant, according to the doctrine in *Taylor v. Diplock* (b).] The like rule must prevail here. A similar case (where persons were lost at sea) was before this Court in 1831 (c); but the rule was enlarged, that the parties might come to a compromise. In no instance have the Courts presumed the time of death. In *Watson v. King* (d), an action of trover, one *Maxwell*, who had given a power of attorney to *J.S.* to sell the property in question for him, sailed from *Jamaica* in *March* 1814. The ship parted from her convoy, in bad weather, on the 9th, and neither she nor *Maxwell* were again heard of. There was also a heavy gale on the 20th. On the 8th of *June* in the same year *J.S.* sold to the defendant under the power; and at the trial, in 1815, the question was, whether, before that time, the power had not been revoked by *Maxwell's* death? Lord *Ellenborough* (referring to the rule usually adopted in cases of insurance, that a vessel proved to have sailed and not

(a) 3 *Hagg. Ecc. Rep.* 748.(b) 2 *Phillimore*, 261.(c) See also the case of the representatives of General *Stanwis* (in *Chancery*, 1772). Some account of which is given in *Mr. Fearn's Posthumous Works*; and see other notices of it cited, 2 *Stark. on Evid.* 26. note m.(d) 1 *Stark. N. P. C.* 121.

to have been heard of for two or three years, may be considered as lost) thought it might be assumed here that the vessel was lost, and that *Maxwell* had perished; but left it to the jury whether or not he was dead on the 8th of *June*. They found for the plaintiff, and the Court refused a rule nisi for a new trial. [*Denman C. J.* The onus of proving that *Maxwell* died before the 8th lay upon the party who relied on that fact; and it was considered to be proved.] There, as in this case, it might have been contended, that, the presumption of loss arising at the end of two or three years, it could not be assumed that the vessel had been lost before that period expired. But the presumption really was this; that she would have been heard of within that time, if she had not been lost; not that she was lost at the end of that time. And it is the same as to a person's death. The defendant here does not rely upon any presumption that *Matthew Knight* is not dead, or that he died at one time or another. He merely stands in the situation of a party admitting that *Matthew Knight* was dead when the action was commenced. Then the plaintiff (in order to defeat an adverse possession of twenty-six years) has to shew that his title accrued, by *Matthew's* death, within twenty.

Cur. adv. vult.

DENMAN C. J. in this term delivered the judgment of the Court. The case of *Doe v. Nepean*, which was argued before us during the last term, was this: the lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of *Matthew Knight*. The lessor was of age in 1805. In 1807 *Matthew Knight* sailed to *America*, and was never afterwards heard of, and there was no other evidence of his death.

The

1833.

DOE dem.
KNIGHT
against
NEPEAN.

1833.

Doz dem.
Knight
against
NEWMAN.

The ejectment was brought in 1832. On the trial before my Brother *Taunton*, that learned Judge thought that the presumption of the death of *Matthew Knight* arose in 1814, and the ejectment had been brought in time; but he reserved the point for the consideration of the Court, and gave liberty to move to enter a nonsuit. We are of opinion that the rule should be made absolute.

There is no doubt that the lessor of the plaintiff must recover by the strength of his own title; and in order to do so, must prove that he had a right to enter on the lands sought to be recovered, within twenty years before the ejectment brought; and consequently as the presumption is, that a person once alive continues so until the contrary is shewn, the lessor of the plaintiff was bound to prove, first, the death of *Matthew Knight*; and, secondly, that it took place within twenty years before the ejectment brought.

The absence of *Matthew Knight* abroad for seven years, without having been heard of, is evidence from which a jury might reasonably presume, and in this case have properly presumed, his death. This period has been adopted as the ground for such presumption in analogy to the statutes of 1 *Jac. 1. c. 11.*, relating to bigamy, and 19 *Car. 2. c. 6.* as to the continuance of lives on which leases were held; and the lessor of the plaintiff clearly proved the first of the points necessary to maintain his case.

But such absence abroad for seven years, though it naturally leads the mind to believe that the party is dead, and therefore is sufficient evidence to warrant a presumption of fact that the party *was dead* at the end of seven years, certainly raises no inference as to the exact time of the death; and still less that such death took

took place at the end of seven years. Absence for that period has no tendency to induce the belief that life has ceased at that precise time; and no case has been cited, nor do we know of any, in which it has been laid down as a *rule of law*, that such a presumption ought to be made, or in which, in point of fact, any such effect has been given to evidence of absence abroad; and, on the other hand, one case was referred to in which Lord *Ellenborough* held, that though the loss of a vessel in which a person sailed might be presumed after having sailed on a foreign voyage for two or three years without having been heard of, and so it might be taken that the person who sailed on board was *then* dead, the time of death was to be decided upon by the jury according to the special circumstances. The case was that of *Watson v. King* (a).

1833.

Dor dem.
KNIGHT
against
NEPHEW.

We are, therefore, of opinion that the lessor of the plaintiff, who gave no other evidence of *Matthew Knight's* death than his absence, failed in establishing the second requisite, that his death took place within twenty years before the ejectment brought.

The difficulty of proving the precise time of death in this and similar cases, at first sight appears to work a hardship on the lessor of the plaintiff, who cannot bring his ejectment until after the seven years have expired, for until then the death is not proved, and yet he must bring it within twenty years from the time that his title accrued by the death of the cestui que vie; and, therefore, he has not *practically* a period of twenty years wherein to bring his ejectment. But this is really of little moment; the claimant will always be safe in commencing his action within twenty years after the de-

(a) 1 *Starkie N. P. C.* 121.

1833.

DOX dem.
KNIGHT
against
NETEAM.

parture abroad ; and a similar hardship will often occur where a party entitled is ignorant of his rights during a part of the time when the statute of limitations is running. On the other hand, if we were, for the sake of preventing such an inconvenience, arbitrarily to lay down a rule that seven years' absence abroad (the party not having been heard of), was *prima facie* evidence of his death *at the end* of the seven years, such a rule would in the very great majority of cases, nay in almost every case, cause the fact to be found against the truth ; and, as the rule would be applicable to all cases in which the time of death became material, would in many, be productive of much inconvenience and injustice.

We therefore think that the rule should be made absolute.

Rule absolute.

Wednesday,
May 22d.

GIBSON *against* WINTER and Another.

A trustee suing as a plaintiff in a court of law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the cestui que trust, who uses his name : And, therefore, where

COVENANT on a policy of assurance under seal, executed by the defendants, two of the directors of the Indemnity Mutual Marine Assurance Company, wherein, after reciting that the plaintiff had represented to the defendants that he was interested in, or duly authorised as owner, *agent*, or otherwise, to make the assurance, and had covenanted to pay the premium, it was witnessed, that in consideration of the premises, and of

a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants ; and, therefore, an answer to the action.

80*l.*, the defendants covenanted with the plaintiff that the capital stock and funds of the company should be liable to pay and make good all such losses as might happen to the subject-matter of that policy in respect of the sum of 4000*l.* thereby assured, which assurance was thereby declared to be upon goods laden on board the ship called *The Courier*, lost or not lost, at and from *Rio de Janeiro* to a market in *Europe*. The usual clauses of the policy describing the risks, &c. were then set out. The interest in the goods was averred to be in one *Le Quesne*, and a loss by the perils of the sea. Breach, nonpayment of the sum of 4000*l.* by the defendants. Plea, (among others) that the defendants within a reasonable time after the loss, and before the commencement of this suit, to wit, on, &c. at, &c. paid to the plaintiff, out of the capital stock and funds of the company the said sum of 4000*l.* in the said policy of assurance mentioned, according to the tenor and effect, true intent and meaning of the said policy; and upon this issue was joined. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Hilary* term 1833, the following appeared to be the facts of the case:—The policy was effected on goods the property of Mr. *Le Quesne* of *Jersey*, who employed the plaintiff and his partner, one *Poindestrie*, insurance brokers in *London*, for that purpose. A loss having occurred, a partial adjustment to the amount of 3000*l.* took place in 1829 between the plaintiff and defendants, the defendants then knowing that *Le Quesne* was the party interested in the goods insured. The defendants on that occasion gave credit to the plaintiff for 1524*l.* 9*s.* due from him to them for premiums of insurance on ships and property of other persons, in part payment of this

1833.

—
GIBSON
against
WINTER.

1833.

GIBSON
against
WINTER.

3000*l.*, and paid the balance, 1475*l.* 11*s.*, in cash to the plaintiff. On the 17th of *July* the plaintiff informed *Le Quesne*, by letter, that he had obtained a settlement of 3000*l.* on account, which sum would appear to the credit of his, *Le Quesne's*, account at two months from that date. *Le Quesne*, in his answer, said, "The same is placed in due conformity." In the first week of *October* 1829 the plaintiff became bankrupt, without having paid over to *Le Quesne* either the amount received by him or that allowed in account by the defendants, and this action was in fact brought by *Le Quesne* in the name of the plaintiff to recover from the defendants 1524*l.* 9*s.*, on the ground that the plaintiff was authorised to receive the amount of the loss in money only, and that a payment in any other way was not binding on his principal. Lord *Tenterden* was of opinion that that general rule ought to prevail, unless *Le Quesne* had, in this case, recognised and adopted the mode of payment; and observed that if the mode of payment had been made known to *Le Quesne*, and he had not, within a reasonable time, objected to it, he must be taken to have adopted it; that the question was, whether he did know it. *Gibson*, his Lordship observed, in his letter of the 17th of *July*, informed *Le Quesne* only that he had obtained an *adjustment* to the amount of 3000*l.*, not that he had received actual payment of that sum, and that that sum would, at the end of two months, be placed to his, *Le Quesne's*, credit: *Le Quesne*, in his answer, after adverting to the adjustment, said, "*the same is placed in due conformity.*" And he told the jury to find for the defendants if they thought *Le Quesne* meant to give credit for 3000*l.* to *Gibson*, and to accept him as his debtor instead of the defendants. The jury found for the defendants.

A rule

A rule nisi was obtained for a new trial, on the ground that *Le Quesne's* assent was not proved, and that although in general where an agent is employed to receive money of a debtor, and the debtor pays him money, the debtor is discharged; yet if the debtor does not pay in money, but settles the account by writing off so much money as may be due from the agent to him, the latter is not discharged, *Todd v. Reid* (a), *Russell v. Bangley* (b), *Bartlett v. Pentland* (c), *Scott v. Irving* (d).

1833.

GIBSON
against
WINTER.

The *Solicitor-General*, Sir J. Scarlett, and Tomlinson in the last term shewed cause (e). Though it be true that a broker has no authority to settle on any other terms than those of payment in money, yet if he receives payment in another mode, as by a set-off in a general account with the underwriter, and the assured afterwards recognises and adopts that mode of payment, he cannot afterwards repudiate it. Here, the jury have found that there was such adoption, and there was ample evidence to warrant that finding. The plaintiff acted as *Le Quesne's* agent in effecting insurances for several years; he informed him, on the 17th of July, that he had obtained a settlement of 3000*l.* on account of the loss, and that that sum would appear to his, *Le Quesne's* credit, at two months after date. *Le Quesne*, in his answer, assents to that, by stating "that the 3000*l.* shall be placed in due conformity," in other words, that he will debit Gibson with that sum at the end of two months. [Parke J. That might be an assent, if *Le Quesne* had had notice of the mode in which payment had been made to Gibson;

(a) 4 B. & A. 210.

(b) Ibid. 395.

(c) 10 B. & C. 760.

(d) 1 B. & Ad. 605.

(e) Before Denman C. J., Littledale J., and Parke J.

1893.

GIBSON
against
WINTER.

but he was not informed that any payment had been made, and much less that it was made by set-off in account.] Assuming that the finding of an assent cannot be supported, the cases cited in moving for the rule do not apply; for, in those, the actions were brought in the name of the assured, and not of the broker, and the assured disputed the authority of the broker to bind them; but here the action is brought in the name of the broker, and he attempts to repudiate his own act, and, claims to be permitted to say that a payment which he himself has received is no payment at all. Any act done, or admission made by a party on the record, is evidence against him, even though he sue as trustee for another. *Bauerman v. Radenius (a)*. An admission by the obligee of an assigned bond (by whom the action must be brought), is evidence to bar the action: *Craig v. D'Aeth (b)*. The issue raised on the record is, whether the sum mentioned in the plea was paid to the plaintiff; and the fact of payment to the plaintiff was made out.

R. V. Richards contra. The issue is, whether payment was made according to the tenor and effect of the policy. It is consistent with the policy that *Gibson* may have effected it as agent, and that payment may have been made to him (as in fact it was) in that character. Then this payment to him by set-off in account, was not one which he had authority to receive as agent, and therefore not a payment made according to the tenor and effect of the policy. Secondly, there was no evidence to warrant the finding of the jury that *Le Quesne* had ever assented to the payment by set-off in account between the defendants and *Gibson*, for there

(a) 7 T. R. 663.

(b) Ibid. 670. note (b).

was no proof that *Le Quesne* was ever informed that the payment was made to *Gibson* in that mode. [*Parke J.* The difficulty is, that *Gibson* is the party to the record. Is there any authority for saying that a plaintiff, who has received payment in a mode satisfactory to himself, can be permitted afterwards to say that it is no payment?] In *Carr v. Hincliffe (a)*, to assumpsit for goods sold and delivered, the defendant pleaded that the goods were sold and delivered to the defendant by *A.*, the factor and agent of the plaintiff, with the privity of the plaintiff, as and for the goods of *A.*, and that the defendant did not know that the goods were not the property of *A.*; that at the time of the sale and delivery, *A.* was and still is indebted to the defendant in more than the value of the goods, and that the defendant is ready and willing to set off and allow to the plaintiff the value of the goods, out of the monies so due and owing from *A.*; and it was held, on special demurrer, that the plea was good. [*Parke J.* There, the principal was the plaintiff on the record; here, the agent is.] The covenant being with him, he is the only person who could sue on it, and the question is, whether, though a plaintiff sue in fact for the benefit of another, any thing which would be matter of defence against him, the party on the record, is an answer to an action.

Cur. adv. vult.

DENMAN C. J., in the course of this term, delivered the judgment of the Court, and, after stating the facts of the case, proceeded as follows:—

On the trial before the late Lord *Tenterden*, at the

1833.

GIBSON
against
WINTER.

(a) 4 B. & C. 547.

1833.

GIBSON
against
WINTER.

sittings after *Trinity* term, the defendant had a verdict, on the ground that *Le Quesne* had acquiesced in, and adopted the mode of, payment to the plaintiff, and was bound by it. Mr. *Pollock* moved for a new trial in the following term: — The case was afterwards fully argued before us; and if it had depended upon the propriety of the verdict we should have thought it right to submit the case to the consideration of another jury, for we are by no means satisfied that there was sufficient evidence of adoption by *Le Quesne*, as he was never correctly informed of the real state of facts.

Another objection was, that as the covenant was with *Gibson*, and he only could sue upon it, payment to him, in any mode by which he was bound, would be a good payment as against *Le Quesne*; and that as the settlement with the plaintiff bound him, it equally bound *Le Quesne* suing in his name. And upon full consideration, we are of opinion that this objection is valid.

The plaintiff, though he sues as a trustee of another, must, in a court of law, be treated in all respects as the party in the cause: if there is a defence against him, there is a defence against the cestui que trust who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself.

The following are the authorities which appear to us fully to warrant this position. In *Bauerman v. Rade-nius* (in which the question was, whether the admission by the plaintiff, who was clearly a trustee for another, could be received in evidence), Lord *Kenyon* (a) says: “If the question that has been made in this case had arisen before Sir *Matthew Hale*, or Lords *Holt* or

(a) 7 T. R. 668.

Hardwicke, I believe it would never have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties to the cause. If the plaintiffs may be taken to be off the record, then they may be examined as witnesses; and yet it is not pretended they could have been examined. I cannot conceive on what ground it can be said that they may be considered not as the parties to the cause for the purpose of rejecting their admissions, and yet as the parties to the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that an admission made by the plaintiff on the record is admissible evidence." So a release by the plaintiff on the record suing for the benefit of another, was decided, in a case before Lord *Mansfield* (cited in *Bauerman v. Rade-nius (a)*), to be a good answer at law, and *Lawrence J.* expresses the same opinion in the case last mentioned; and courts of law have been in the habit of exercising an equitable jurisdiction on motion, and setting such releases aside, or preventing the defendant from pleading them, as in *Legh v. Legh (b)*, *Payne v. Rogers (c)*, *Jones v. Herbert (d)*, and *Abbott C. J.* in *Scaife v. Johnson (e)*, and many other cases, which practice shows very clearly the opinion of the Courts, that, but for their equitable interference, the real plaintiff would be barred. In *Craig v. D'Aeth (g)* the circumstances of fraud upon the real plaintiff were replied; but no objection appears to have been taken on this ground, and the general practice is undoubtedly to apply specially to the Court. Again, in

1833.

GIBSON
against
WATMAN.

(a) 7 T. R. 666.

(c) *Doug.* 407.

(e) 3 B. & C. 422.

(b) 1 Bos. & P. 447.

(d) 7 Taunt. 421.

(g) 7 T. R. 670. note (b).

1833.

GIBSON
against
WINTER.

Alner v. George (a), where trustees, for the benefit of creditors, sued in the name of the insolvent, Lord *Ellenborough* held that a receipt in full for the amount by the plaintiff, was an answer to the action; and his Lordship said: "If a motion had been made in term time to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look to the strict legal rights of the parties upon the record; and there can be no doubt, that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released the action; and it is impossible to admit evidence of his attempting to defraud others."

In *Jones v. Yates (b)*, Lord *Tenterden* says: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person;" and therefore it was held, that where one of two partners disposed of some of their effects in fraud of the other, *both* could not sue in a court of law to recover for them, in an action of trover.

Upon principle, and upon these authorities, we are of opinion, that if there be a good defence against the plaintiff, there is a good defence against *Le Quesne* suing in his name.

The only remaining question is, whether there is a good defence against the plaintiff.

Now, if the plaintiff was suing for himself, it is clear that the plea of payment would have been proved, for

(a) 1 *Campb.* 392.(b) 9 *B. & C.* 539.

credit given to the plaintiff by mutual agreement for the amount of the premiums, was equivalent to payment by the plaintiff to the defendants of that amount on account of the premiums, and a payment by the defendants to the plaintiff of the same sum on account of the loss.

We therefore think, that the defendants were no longer liable, but as this point, upon which we decide the case, was intended to have been reserved, if necessary, by *Lord Tenterden*, in which case a nonsuit would have been directed, we think that a similar rule should be now pronounced.

Nonsuit to be entered.

1832.

GRISON
against
WINTER.

GRAVES *against* WELD.

Wednesday,
June 12th.

TRÖVER for clover, the clover hay, and clover seed.

Plea, not guilty. At the trial before *Taunton J.*, at the *Dorsetshire* Summer assizes 1832, a verdict was found for the plaintiff subject to the following case:—

The plaintiff being possessed of a close under a lease for ninety-nine years, determinable on three lives, in the course of the Spring of 1830, sowed it with barley; and in *May* of the same year, he sowed broad clover seed with the barley. The last of the three lives ex-

Tenant for a term determinable upon a life, sowed the land in spring, first with barley, and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant

which had sprung up. The clover so taken made the barley straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expence of cultivating the clover, and a farmer would not be repaid such expence in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing: Held, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley.

pired

1833.

~~GRAVES~~
GRAVES
against
WELLS.

pired on the 27th of *July* 1830, the reversion then being in the defendant. In the autumn of 1830, the plaintiff took the crop of barley, in the mowing of which a little of the clover plant which had sprung up was cut off and taken together with the barley. In *January* 1831, the plaintiff gave up the possession of the close to the defendant. According to the usual course of good husbandry, broad clover is sown about *April* or *May*, and the crop is fit to be taken for hay about the beginning of *June* in the following year. The clover in question was cut by the defendant about the end of *May* 1831, which was more than a twelvemonth after the seed had been sown. After the barley is cut, the clover is sometimes depastured by sheep in the autumn, whereby the crop is made thicker; if not so fed off, the shoots would be killed by the frost in the winter. In this case the clover was not depastured. Broad clover is sometimes sown by itself; but more frequently with barley, flax, oats, or wheat. The part of the clover plants cut off with the barley at the time of mowing it, makes the barley straw better as fodder; but the clover is sown for hay, or seed, and not to improve the barley straw. When the clover grows up high, it is injurious to the barley. It is the common course of husbandry, to take for hay a second crop of the clover in the autumn of the year after it is sown; and a second crop was so taken by the defendant in the autumn of 1831. But when it is intended for seed, no crop is taken for hay in the summer. Sometimes the clover is left for a third year, but it is not then a good crop. The usual course of husbandry is to plough up the land in the autumn of the second year for wheat. There was no covenant in the lease as to the away
going

going crop, or binding the tenant to any particular course of husbandry.

The learned Judge took the opinion of the jury on the two following questions. First, whether the plaintiff received any benefit from taking the clover with the barley straw, sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. Secondly, whether a prudent and experienced farmer, knowing that his term was to expire at *Michaelmas*, would sow clover with his barley in the spring, where there was no covenant that he should do so; and, whether, in the long run, and on the average, he would repay himself in the autumn for the extra cost incurred in the spring. The jury answered both these questions in the negative.

The question for the opinion of the Court was, whether the plaintiff was entitled to the clover cut in *May* 1831, as emblements.

The case was argued in this term.

Follett for the plaintiff. The question is, whether the tenant, whose interest has been put an end to by the death of cestuique-vie, is to have the crop of clover as emblements? The rule is, that, where a tenant holding for an uncertain time sows and manures the land, or generally bestows labour and expense upon it, for the purpose of raising a crop, he is entitled to that crop as emblements; though he is not entitled to any thing of a permanent nature, as trees planted by him, or their produce. The objection to the right of the tenant in this case will probably be, that the clover was sown early in the *May*, and not cut till the end of the *May* of the following year; and that

1838.

 GRAVES
 against
 WELLS.

1833.

 GRAVES
 against
 WELD.

that because some of the old authorities, in describing emblements, use the words "annual profits," the tenant here cannot be entitled, the clover not coming under that description. This use of the word "annual" arises from the fact, that the crop sown, in most cases, is taken in the course of a year. There are, however, several sorts of crops which are not cut in that time, as to which, nevertheless, the tenant is entitled to emblements. The principle is thus laid down by Mr. Justice *Blackstone*: "If a tenant for his own life sows the lands, and dies before harvest, his executors shall have the emblements or profits of the crop, for the estate was determined by the act of God; and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements, to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it (a). . . . The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass, and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural, profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit, but merely with a prospect of its being useful to himself in future, and to future successions of tenants (b)." Both the reasons here given, the justice of compensating the tenant, and the importance

(a) 2 *Bla. Com.* 122. (Book 2. ch. viii.)(b) *Ibid.* 123.

of encouraging husbandry, apply to crops which are not annual. The doctrine of the passage in *Blackstone* is taken from Lord *Coke's* commentary on the sixty-eighth section of *Littleton* (a). The distinction is between those cases where an expense has been incurred by the tenant, on the expectation that the crop was to repay him, and those where the tenant has not been put to expense on such expectation, as in the instance of trees not planted by himself. Therefore, if the lessee for life of a hop-ground die in *August*, before the hops are severed, the executor shall have them, though growing on ancient roots: *Latham v. Atwood* (b). [*Lit- tledale J.* What would you say of liquorice, or madder? *Parke J.* Or teazles?] The Court of Common Pleas has allowed the right to emblements of teazles; *Kings- bury v. Collins and Another* (c): at any rate, the right was not contested. But, in fact, no distinction can be taken between annual and other artificial crops. The party sows, and must receive compensation for so doing; otherwise no tenant for an uncertain interest would sow or manure. And the questions put to the jury by the learned Judge who tried the cause were intended to ascertain the nature of the crop, not the time it takes to come to maturity: the real ground of the tenant's claim being the expense and the labour. [*Parke J.* Would you extend that to four or five crops? the effect of manuring may continue for ten years.] Only one crop is claimed. [*Patteson J.* That you have had, the crop of barley.] The finding of the jury is con- clusive against that. Suppose the clover had been sown without the barley; as the facts are found, the

1833.

 GRAVES
against
WELD.
(a) *Co. Litt.* 55. a. b.(b) *Cro. Car.* 515.(c) 4 *Bingh.* 202.

1833.

 GRAVES
 against
 WELD.

plaintiff would be situated exactly as he is at present. The clover is not sown to benefit the barley: it may be injurious to it. The clover was sown with a view to repayment by cutting the clover; the barley, with a view to repayment by cutting the barley. [*Parke J.* But you have had a crop of clover.] Clover is sown that it may be mown in the following year. The plaintiff has had no compensation for sowing the clover. [*Parke J.* Some compensation he has had: you are insisting that he must have an adequate one.] It may perhaps be questionable whether the plaintiff be entitled to a second crop of clover; but that he does not seek; he does not complain of the crop cut in autumn 1831, but of that cut in *May*. [*Patteson J.* The question is this; if you sow a crop to be taken eighteen months after, are you to have emblements?] The sowing and the rolling were exclusively for the clover. Suppose the cestui qui vie had died a week before the maturity of the crop, would there not have been emblements? Then why not in the present case? When is the year to begin? Is it to be the next calendar year? if so, the crop was taken by the defendant before the year was expired. [*Littledale J.* The year may be reckoned from the sowing. *Parke J.* In the case of hops, the year runs from the time at which the additional expense is incurred which is necessary to make the hops grow.] There is no ground for confining the time to a year at all: it is a mere question of repayment. The distinction between crops which are usually annual and those which are permanent, is intelligible, only on the ground that expense is incurred in one case and not in the other. And the distinction, so understood, would be consistent with the allowance of emblements of crops which came to maturity

maturity thirteen months after they were sown; a case which is clearly within the mischief sought to be prevented by the privilege of emblements. Dr. *Burn* (a) remarks, that the matter had not come in question; but gives his opinion that, "for clover, saintfoin, and the like, the reason of manurance, labour, and cultivation, is the same as for corn."

1833.

 GRAYES
 against
 WELD.

Gambier for the defendant. The true principle is, that the law confines its allowance of emblements to those cases in which there is an outlay of cost or labour in one part of the year, the recompence for which cost or labour is to arise, *in the shape of a crop*, in another part of the same year. If the decision in this case should be in favour of the plaintiff, it would lead to innumerable questions hereafter, all of which will be precluded by a strict adherence to the ancient rule, which is consistent with all the authorities cited on behalf of the plaintiff. With respect to the passage cited from *Blackstone*, although it is true that the privilege of emblements was established for the purpose of encouraging husbandry, and of compensating the tenant for his labour and expense, yet neither of these purposes furnishes the test by which it is to be determined to what extent that privilege is to be allowed. It is good husbandry to convert unproductive grass land into fertile meadow land, yet the law allows no compensation for so doing (b). It is good husbandry to plough and manure land; yet if the tenant's estate determine before he puts in the seed, he will be entitled to no compensation (c).

(a) 4 *Ecc. Law*, 299. Cited in 1 *Williams Executors*, 454.

(b) *Co. Litt.* 69. a.

(c) *Hale's MSS.* note (4) to *Co. Litt.* 55. a. (ed. H. & B.)

Br.

1833.

 GRAVES
 against
 WELD.

Br. Abr. (a) Then as to the compensation. If a tenant by statute merchant sow the land, and before the maturity of the crop he be satisfied by a casual profit, he shall have the corn, and therefore receives more than compensation for his expense and labour (b). Therefore these two tests must be abandoned; and this destroys any argument which could be drawn from the finding of the jury, for that finding really amounts only to this, that, generally, a tenant who sowed clover in the spring would not receive compensation before the following *Michaelmas*, and that, in this particular instance, the tenant has not received compensation. It might be added, too, that the finding is imperfect, even as to the question of compensation; it ought to have extended to the *July* of the succeeding year. Again, clover is ordinarily fed in the autumn, and the feeding has not been taken into the account. But the rule, instead of being dependent upon these tests, has been laid down in positive and arbitrary terms. The compensation must arise, in the shape of a crop, within the year in which the cost is incurred. Lord *Coke*, after speaking of a corn crop, which is the instance put by *Littleton*, says (c), "And so it is, if he set rootes, or sow hempe or flax, or any other annual profit, if, after the same be planted, the lessor oust the lessee; or, if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or young oaks, ashes, elmes, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding,

(a) *Emblements*, 7.; also *Tenant per Copie*, &c., 3. 11 H. 4. 90. cited in each place.

(b) *Vin. Abr. Emblements*, (A.) pl. 20. Co. Litt. 55 b.

(c) Co. Litt. 55 b.

because

because they will yeeld no present annuall profit." So Chief Baron *Comyn* (a), after speaking of corn and roots, as going to the tenant's executor, adds the following cases: — "If he plant hops from old roots; for he annually manures the land, &c. If he sow hemp, flax, or other thing of an annual profit." So in *Rolle's Abridgment* (b), "If lessee at will sows the land with grain, roots, flax, hemp, or other annual profit, and the lessor enters before severance, yet he shall have it." The exceptions made by *Blackstone*, in the passage cited on the other side (c), recognise the same criterion. The old law seems to have allowed emblements within the year to that tenant only who had actually sown. The case of *Latham v. Atwood* (d) went further; for, in that case, the party might, or might not, have put into the ground that which produced the crop. The language of the report is, that hops were *like* emblements. *Cruise* remarks upon this case (e), "This determination was probably on the account of the great expense of cultivating the ancient roots;" from which language it may be collected that the writer considered the decision to have introduced a novelty. [*Denman* C. J. There was some discussion as to the time at which hops began to be cultivated at all in this country, in a case in the House of Lords: *Knight v. Halsey* (g).] In *Kingsbury v. Collins* (h), the question was not argued at the bar; the point as to emblements¹ was merely suggested by the

1838.

GRAVES
against
WELD.(a) *Com. Dig. Biens*, (G. 1.)(b) 1 *Roll. Abr.* 728., *Emblements*, (A.) 22.(c) 2 *Bl. Com.* 123. (book ii. ch. 3.), ante, p. 108.(d) *Cro. Car.* 515.(e) *Cruise's Dig.* (I.) 110. (Ed. 5.)(g) 2 *B. & P.* 180.(h) 4 *Bing.* 202.

1838.

 GRAVES
 against
 WELD.

Court towards the end of the argument. No reference was made, in the pleadings or elsewhere, to the nature of the crop of teazles, or of their cultivation, nor to the time of their being planted, or coming to maturity, or being cut. [*Parke J.* And it was assumed that tenant from year to year was entitled to emblements, without any custom of the country to that effect being shewn to exist.] In point of fact, teazles are sown in *March*, thinned and hoed after they come up, thinned and hoed again in the following year, and the crop is taken in the *August* of that following year. Again, in the case of hops, the fact is that they grow by the manurance and industry of the owner, by the making of hills and setting of poles. So that, in each case, there is not merely the original outlay, but an annual outlay and labour, which cannot be said in the present case. With respect to the passage cited from *Burn*, it is alluded to in a manuscript note of Mr. Serjeant *Hill*, on the following passage in *Viner's Abridgment* (a):—"So, if lessee at will sows the land with hay-seed, and by this increases the grass, and the lessor enters and ejects him, yet the lessee shall not have it." The note is as follows:—"V. *Burn's Eccl. Law*, 2 vol. 647. (b), that it seems otherwise as to clover, saintfoin, and the like, but that no case occurs wherein these matters have come in question. If arable land is sown with a crop of corn and clover, &c., in *March*, and the estate of the tenant, being uncertain, determine, not by his own act, after harvest, and before the next year's crop of clover is ripe (which is usually

(a) *Vin. Abr.* 9. 368. (folio), *Emblements*, 25.

(b) Sic in MS. The reference is to the edition of 1763, and corresponds to vol. iv. p. 299. of later editions.

in *May or June*), it seems that this crop of clover will belong to him in mainder or reversion; for this crop was not a *present annual profit*, according to the expression in *Co. Lit. 55. b.* But if the land had been sown only with clover, &c., and the estate had determined as aforesaid, before the clover was ripe, whether the first and second crops of clover in the same year (for there are usually two crops in a year), or whether the first crop only, or neither of them, shall belong to the tenant, or his executors or administrators." Independently of all authority, the importance of a fixed arbitrary rule is apparent, from the disputes and inconveniences which would arise from allowing the right to emblements in the present case. Who is to have the benefit of the autumn feeding? The case finds depasturing in autumn to be necessary; is the remainder-man to do this, or can he, by neglecting it, destroy the previous tenant's right, or is the previous tenant himself to occupy that he may depasture? Whose is the second crop of the second year? The case finds that, where the clover is for seed, no crop is taken for hay. Now, if the leasee be entitled to the first crop only, can he have it for seed, and so deprive the remainder-man of the second crop altogether? The case extends the difficulty even to the third year; and the analogy will be applied to artificial grasses, some of which can not be taken till the third year. In the case of fresh plants of hops, the remainder-man may be kept out for three years, if the tenant is to have compensation.

Follett in reply. The plaintiff claims only that crop which is the produce of his industry, and which is

1833.

 GRAVES
 against
 Walsh.

1899.

GRAVES
against
WELD.

actually growing at the determination of his estate. For that is no longer land, but personalty: it may be considered as virtually severed, and, if the land were occupied by the tenant in fee, it would go to his executor and not to his heir. And this relieves the case from the analogies which have been suggested on the other side. It might as well be contended that if a tenant put up a fixture, for the purpose of trade, he cannot take it after the expiration of a year, which would be in contradiction to the case of *Penton v. Robart (a)*. Suppose a crop were delayed beyond a year, by a late season, is the tenant to lose this? The case of *Evans v. Roberts (b)* shews that a growing crop is no part of the real estate, for it was there held by *Littledale J.* not to be an interest in land, under the fourth section of the statute of frauds. [*Littledale J.* I am not prepared to say that I should not have considered that a crop of apples would go to the executor also; so that this proves too much. The ground of the decision was, that the executors were entitled to such a crop as chattels.] The crop might be taken in execution. And all the cases on the statute of frauds turn upon the question of personalty or not personalty, not upon the distance of time at which the crops have been sowed. The expressions cited on the other side apply to the distinction between periodical and permanent produce, not to the distinction between a year and a year and a day. [*Parke J.* Suppose the case of a nurseryman, who plants, intending to remove what he plants.] He would be entitled to do so, if his estate determined as in the

(a) 2 East, 88.

(b) 5 B. & Cr. 829.

present case. No objection can arise from a crop of barley having been taken by the plaintiff after the determination of his estate; for, if his estate had lasted over the time at which he took the barley, the growing crop, without any additional act, or expense, would have been the clover simply. [*Patteson J.* Who is to hoe and weed?] The same party who would hoe and weed in the case of corn growing: the distinction between corn and clover is denied by the plaintiff,

Cur. adv. vult.

DENMAN C. J. on a subsequent day delivered the judgment of the Court.

In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description? We think it does not.

In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labour; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labour, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labour in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop

1833.

GRAVES
against
WELD.

1893.

GRAVES
against
WELD.

of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labour by which it is produced, within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law.

It is not, however, absolutely necessary to decide this question; for, assuming that the plaintiff's rule is the correct one, the crop which is claimed was not *the crop growing at the end of the term*. The last cestui que vie died in *July*: the barley and the clover were then growing together on the same land, and a crop of *both*, together, was taken by the plaintiff in the autumn of that year; though the crop of clover of itself was of little value. Thus the plaintiff has *had one crop*: and if it were necessary, either generally, or in the particular case, that the crop taken should remunerate the tenant, we must observe, that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground: but as the more general and important question has been most fully and elaborately argued, we think it right to say we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends, are *Littleton*, sect. 68., and *Coke's* commentary on that passage. The former is as follows: "If the lessee soweth the land, and the lessor, after it
is

is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry, egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him." Lord *Coke* (a) says, "the reason of this is, for that the estate of the lessee is uncertaine, and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe or flax, or any other *annual* profit, if after *the same be planted*, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have *that year's crop*. But if he plant young fruit trees, or young oaks, ashes, elms, &c. or sow the ground with acornes, &c. there the lessor may put him out notwithstanding, because they will yield *no present annuall profit*." These authorities are strongly in favour of the rule contended for by the defendant's counsel; they confine the right to things yielding present *annual* profit: and to that year's crop, which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood* (b), they were held to be "*like emblements*," because they were "such things as grow by the manurance and industry of the owner, by the making of hills, and setting poles:" that labour and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and

1833.

 GRAVES
 against
 WELD.
(a) *Co. Litt.* 55 a.(b) *Cro. Car.* 515.

1833.

 GRAVES
 against
 WELD.

planting of other vegetables. Mr. *Cruise* in his *Digest* I. 110. (a), says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements; it by no means proves, that the person who *planted* the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to shew that things which take more than a year to arrive at maturity, are capable of being emblements, except the case of *Kingsbury v. Collins* (b), in which teasles were held by the Court of Common Pleas to be so. But this point was not argued, and the Court does not appear to have been made acquainted with the nature of that crop or its mode of cultivation, or it *may be*, that *in* the year when the plant is fit to gather, so much labour and expense is incurred, as to put it on the same footing as hops. We do not therefore consider this case as an authority upon the point in question.

The note of Serjeant *Hill* in 9 *Vin. Abr.* 368. in *Lincoln's Inn Library*, which Mr. *Gambier* quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because, there the estate of the tenant is supposed to determine *after* harvest, whereas here it determined before.

The weight of authority, therefore, is in favour of the rule insisted upon by the defendant. There are besides some inconveniences, doubts, and disputes,

(a) Ed. 3.

(b) 4 *Bing.* 202.

which

which were pointed out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in autumn, besides the crop in the following year? If so, he gets something *more* than one crop. Is he to have the possession of the land for the purpose? Or is the reversioner to have the feeding; and, in that case, is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant's rule is adopted. (It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at the most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.)

We are therefore of opinion, that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment.

Judgment for the defendant.

1833.

GRAVES
against
WELD.

1833.

Thursday,
May 30th.

DOE dem. JOSEPH Gwillim against SAMUEL
Gwillim.

Testator devises as follows: — "As touching my worldly estate, I give, devise, and dispose of the same in the following manner: first, I give to my wife *Ann* the whole of my estates, goods, and chattels, living stock, and debts, during her widowhood, and no longer, but demately to go to my dear children as I have appointed and disposed to them in lots and money." He then, after giving to his eldest son a sum of money, left to his second son a lot of land (therein described), to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever. Then followed four other devises in similar terms to four other sons, and then he gave to his son *John* a dwelling-house and piece of ground, &c., also his goods and living stock. He then devised to his daughter a house and gardens, and to her son and his lawful heirs for ever: Held, that *John* took a life estate only in the house and ground devised to him.

EJECTMENT for a dwelling-house, &c. in the county of *Gloucester*. At the trial before *Bosanquet J.*, at the *Gloucester* Summer assizes 1832, the lessor of the plaintiff, *Henry Gwillim*, proved the marriage of his father and mother, the baptism of himself, and the death of his father, the testator, in the year 1817 in possession of the premises. In answer the defendant contended, that the property in question, being formerly part of the *Forest of Dean*, and encroached therefrom, the plaintiff could not recover in an action of ejectment unless he shewed a title previous to the 20 Car. 2. c. 3., which avoided any grant made by the crown subsequent to that act, and for this *Goodtitle v. Baldwyn* (a) was cited. The defendant further put in the will of his father, the said *Henry Gwillim*, which bore date the 7th of May 1804, and was as follows: — "As touching such worldly estate where-with it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form: first, I give and bequeath to my wife *Ann* the whole of my estates, goods, and chattels, living stock, and debts, during her widowhood, and no longer, to keep it in possession, nor by any husband, or help-mate, or company keeper, or inmate, or by any person

(a) 11 East, 408.

that

that take a lease of her life, or lodger, but demearly to go to my dear children as I have appointed and disposed to them in lots and in money.

Secondly, to my son *Joseph Gwillim* I leave 10*l.* out of my goods and chattels, to be paid him.

Thirdly, to my son *Henry Gwillim* I leave the piece of ground called *James's Patch*, to him and his lawful heirs for ever, and if no heirs, to his next brother, and his lawful heirs for ever.

Fourthly, to my son *George Gwillim* I leave the piece of ground called *Jones's Patch* to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever.

To my son *James Gwillim* I leave the piece of ground called *Matthews's Patch*, and the piece of ground called *Dallamy's Patch*, to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever.

To my son *Samuel Gwillim* I leave the barn and the stables, and the low piece of ground next adjoining, called *Herness's Patch*, and the other called *Clareer Patch*, to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever.

To my son *William Gwillim*, soldier, I leave the piece of ground called *Quance Patch*, to him and his lawful heirs for ever; and if no heirs, to his brother *John Gwillim* and his heirs for ever.

Also to my son *John Gwillim* I leave my dwelling-house and nail-shop, and cider mill, stables, and pigscot, garden, brewhouse, and the piece of ground adjoining to it; also my goods and chattels and living stock that I shall leave.

Also to my daughter *Mary Leyrige* I leave the house called *Dancing House* and gardens, and to her son *Henry Leyrige* and his lawful heirs for ever."

1833.

DOZ dem.
GWILLIM
against
GWILLIM.

This

1833.

Don dem.
Gwillim
against
Gwillim.

This will was properly executed and attested.

In 1817, *Henry Gwillim*, the testator, died; *Joseph*, the lessor of the plaintiff, was his heir at law; his two other sons, *Samuel* and *John*, and his widow, survived him. The widow afterwards died. The defendant produced a conveyance, bearing date the 24th and 25th of *August*, 1819, from the said *John Gwillim*, the devisee, to *Samuel Gwillim*, the defendant, of all his estate and interest in the premises, in consideration of natural love and affection and 10s. In reply, the lessor of the plaintiff called witnesses, who proved that when they first remembered the premises, seventy years ago, the premises were all inclosed, and had the appearance of old inclosures, and that the testator and the party of whom he purchased had occupied the same during the whole of that time. The lessor of the plaintiff further proved the conviction of *John Gwillim*, in 1820, and judgment against him for felony; and that at the time the deed was executed by him to the defendant, he was lying in *Gloucester* gaol on a charge of horse-stealing; and the plaintiff further relied on the statute 17 *Ed. 2. c. 16.*, which recites, "that it is used in the county of *Gloucester*, by custom, that after one year and one day the lands and tenements of felons shall revert and be restored to the next heir, to whom they ought to have descended if the felony had not been done." The learned judge put two questions to the jury: 1st. Whether the premises in question were old encroachments, made previously to the 20 *Car. 2.*? and the jury found that they were. 2dly. Whether the conveyance from *John* to *Samuel Gwillim* was bonâ fide or fraudulent? The jury found that it was fraudulent. Upon this the learned judge said that he was of opinion that *John*

took

took only an estate for life, and therefore that the word *heir* in the stat. 17 Ed. 2. c. 16. did not apply to the case; and he directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a verdict.

1833.

DOE dem.
GWILLIM
against
GWILLIM.

R. V. Richards now shewed cause. *John Gwillim* took under the will of the testator an estate for life only; and if that be so, upon his death, that estate vested in *Joseph* the heir at law of the testator. If the devise to *John* had stood alone, it would clearly have given him an estate for life only, because there are in it no words of inheritance as there are in the devises to five other sons. It appears from that, the testator knew how to give an estate of inheritance, and as he has not used words sufficient for that purpose in the devise in question, he *must be taken* to have intended to give *John* a life estate only. *Gall v. Esdaile* (a) will be relied upon by the other side. There, the testator, after commencing with a recital of his intention to dispose of his worldly estate, bequeathed some pecuniary legacies, and then proceeded, "As to the rest of my estate, the two houses (describing them) I give to my wife for life, and after her decease I give one house (describing it) to my daughter *Mary*," and the Court of Common Pleas held that the daughter took a fee under the words "*the rest of my estate*." There those words occurred in the very same clause with the devise to the daughter, and the testator had no other real property. Here the word estate does not occur in the devise to *John*, nor is it incorporated in it by reference. Besides, even in that case the Master of the Rolls held that the daughter took

(a) 8 Bing. 323.

1883.

Doct dem.
Gwillim
against
Gwillim.

an estate for life only (a). The general rule is, that the heir at law is not to be disinherited without express words or by necessary implication. Supposing that *John* took a fee, this is not a case within the custom mentioned in the stat. 16 *Ed. 2. c. 16.*, because that applies only to cases of attainder and execution, and not to a case where the felon is still alive.

The *Solicitor-General* and *Busby* contra. It may be collected from the whole of the will, taken together, that the testator intended to give a fee to *John*, and construing the devise to him in conjunction with the first devise to the wife and children, the words used are sufficient to give him the fee. The introductory clause, by which the testator expresses an intention to devise all his worldly estate, shews that he intended to depart with his whole interest; and the subsequent words ought, therefore, if possible, so to be construed as to pass an estate in fee, and to prevent an intestacy as to any part of the property. The testator, after that introductory clause, gives to his wife the whole of his estates, goods and chattels, &c. If the will had stopped there, she would, by force of the word *estates*, have taken a fee: *Rowe v. Bacon* (b); but he afterwards cuts down the devise to her to an estate during widowhood, and then directs that the whole of his estates, and goods, and chattels shall go to his children, as he has appointed to them, in lots and money. If the will had stopped at the word "children," they would, by force of the word *estates*, have taken a fee as joint tenants. By the first devise the testator has, in the words "the whole of his

(a) 1 *Russ. & M.* 540.(b) 4 *M. & S.* 362.

estates,"

estates," marked out the quantity of interest he intended his children to have in their respective lots, meaning, by the subsequent clauses, to apportion his property, real and personal, among them. The words, "*the whole of my estates*," may be considered as incorporated, by reference, in all the subsequent clauses; and, if so, those words, construed with reference to the introductory clause, will pass a fee. The question is, at all events, whether the words of the subsequent devises of the specific lots, vary or diminish the effect of the word "estates" in the first devise. The devise of the lot to the second son is to him and his lawful heirs for ever; but then, as the testator adds, "if no lawful heirs, to his next brother and his lawful heirs for ever:" it follows that, by the word heirs, he meant, not heirs generally, in which the next brother would be included, but special heirs, or heirs of the body; and consequently the second son took an estate tail in the lot devised to him. The same observation applies to the devises to the four other sons. The effect, therefore, of the word *estates*, may be so varied by the devises to the first five sons, as to cut down a fee to an estate tail; but in the devise to *John* there are no such words, and consequently there is nothing there to vary the effect of the words, "*the whole of my estates*," in the first devise. Besides, in the devise to *John*, the *dwelling-house and land* is coupled with the goods and chattels; and as there can be no doubt he intended to pass the entire property in the goods to him, it may be fairly inferred that he meant also to give him an entire interest in the land.

1853.

Dor dem.
Gwillim
against
Gwillim.

DENMAN C. J. It is very difficult to apply any former decision to a case of this sort. Other cases are
valuable

1833.

DOX DON.
GWILLIEM
against
GWILLIEM.

valuable only as furnishing a rule of construction. *Gall v. Esdaile* (a) is not in point. It is true that, in the early part of this will, the testator expresses an intention to devise *all his worldly estate*; whence it may be fairly inferred (it is said), that he intended to devise the fee; but still, in order to effectuate that intention, it was necessary that he should afterwards use in the devising clause words sufficient to pass a fee; and the question is, whether, in the devise to *John*, there are any such words. At first I thought the words “the whole of my estates” over-rode, and were to be considered as incorporated by reference in the other devising clauses of the will, so as to pass to the devisees a fee in their respective lots; but, on further consideration, I think they cannot be so considered, because, in the devises to the five sons (which precede the one to *John*), the testator gives them estates tail only; he cannot, therefore, by the use of the words “the whole of my estates,” in the first devise, have supposed that he had already given those sons a fee. And if those words are not to be considered as incorporated in the devise to *John*, the words there used will pass a life estate only. Assuming even that the actual intention of the testator, as expressed in the early part of his will, was to give a fee, he has not in the devise in question used words sufficient to carry that intention into effect. *John* took only an estate for life.

LITLEDAL J. *Gall v. Esdaile* (a) cannot govern the construction of this will. The testator begins by expressing an intention to dispose of *his worldly estate*; and, first, he gives the whole of his estates and goods and

(a) 8 Bing. 323.

chattels to his wife during her widowhood, and then to his children, as he has afterwards disposed of them in lots and money. But when he afterwards divides his property into lots among his children, he does not give to *all* a fee, but to five sons estates tail; and then he devises one lot to *John*, without using any words of inheritance; and afterwards devises a house to his daughter for life, and after her death to her son and his heirs for ever; so that he gives a fee to the grandson. The devise to *John*, therefore, being framed without any words of inheritance, and coming between devises, in which he has given estates tail, and an estate in fee, passes no more than an estate for life. It is said, that because *John* took an absolute interest in the goods and chattels and living stock, it must be inferred that the testator intended he should take a fee in the realty. It is extremely difficult to say what the actual intention of the testator was. The question is, not what his actual intention was, but what is the meaning of the words he has used: and I have no doubt that a devise to one son, without any words of inheritance, contained in a will, in which such words do occur in several devises to other sons, passes only a life estate. I think the heir at law is entitled to recover.

1833.

Doz dem.
Gwillim
against
Gwillim.

PARKE J. In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used. I consider it doubtful what the testator actually meant should be done. But I have no doubt as to the meaning of the words used by him. Immediately before and after the devise in question, he uses words sufficient to

1833.

—
 DORRIS
 GUILLEN
 against
 GUILLEN.

pass estates of inheritance; but in the devise in question there are no such words; there is, then, nothing to shew that he meant to give more than an estate for life to *John*.

PATTESON J. I am of the same opinion. It is not necessary to decide whether the judgment pronounced in *Gall v. Esdaile* (a) by the Master of the Rolls, or by the Court of Common Pleas, was right, because the language used by the testator in that case was different from that in the present will. There the testator in one and the same clause devised *the rest* of his estate, the two houses, describing them, to his wife for life, and after his decease, one of them (describing it) to his daughter *Mary*. In this will, after expressing an intention to devise his worldly estate, he by one clause gives all his estates to his wife during her widowhood, and then to his children as he has appointed in lots and money. Then by another clause he gives 10*l.* to one son, and he afterwards, by separate clauses, devises distinct lots of land to five sons respectively, and their lawful heirs for ever. But in the devise to *John*, the next son, the testator gives the lot to him, but not to his lawful heirs for ever. I have no doubt that, by the words of that devise, no more than a life estate passes.

Rule absolute.

(a) 8 *Bing.* 323. 1 *Russ. & M.* 540.

1833.

DOE dem. THOMAS TUNSTILL *against* THOMAS BOTTRIELL. *Friday, May 31st.*

EJECTMENT. At the trial at the Summer assizes for *Yorkshire* 1832, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—

The premises for the recovery of which this action was brought, are copyhold tenements holden of the manor of *Keesberry Hall, Carwood*. *John Long* being seised in fee of the premises in question according to the custom of the said manor, on the 16th day of *April* 1810, made a voluntary surrender of them out of Court to the use of *George Rylah* and *Thomas Tunstill* (the lessor of the plaintiff), in trust for the said *John Long* for life; and, after his decease, in trust for his children and grandchildren. On the 23d of *December* 1811, the said *John Long*, in consideration of 300*l.* paid to him by the said *Thomas Tunstill*, which was a fair price for the premises, again surrendered them out of Court to the use of *Thomas Tunstill* for life; and, after his decease, to the use of such person or persons as he should by will direct or appoint; and, in default thereof, to the use of the right heirs of the said *Thomas Tunstill*. Both these surrenders were presented at the same Court, holden in and for the said manor, on the 8th of *January* 1812, when, on the former, *George Rylah* and *Thomas Tunstill* were admitted; and, on the latter, *Thomas Tunstill* was admitted. The presentment of the surrender to *Rylah* and *Tunstill*, and their admission thereon,

Copyholds are within the statute 27 *Eliz.* c. 4. which avoids all conveyances of any lands, tenements, or hereditaments, made for the intent and of purpose to defraud and deceive persons that shall afterward purchase the same.

1832.
Bottrell
Tunstall
Bottrell
Bottrell

were entered on the Court rolls, before the presentment of the surrender to *Tunstill* and his admission thereon. After these admissions, *Tunstill* entered into possession of the premises, and continued in possession till within twenty years before the commencement of this action. On the 25th of *March*, *Tunstill* contracted with *J. Bottriell* for the sale of the premises in question, to him (*Bottriell*) for a full valuable consideration, out of which it was agreed that a debt of 200*l.* then owing by *Tunstill* to *J. Bottriell* should be retained. Before that contract was finally completed, *Tunstill* became bankrupt, and a commission of bankrupt was issued against him, under which assignees were duly chosen, who, at a court holden for the manor on the 24th of *January* 1815, were admitted tenants of the premises. On the 16th of *February* 1818, the surviving assignees of *Thomas Tunstill*, in consideration of the residue of the purchase-money expressed in the contract of the 25th of *March* 1813, over and above the said sum of 200*l.* due and owing by *Tunstill* to *J. Bottriell*, surrendered the said premises to *J. Bottriell*, who was thereupon admitted tenant at a court holden on the 14th of *September* 1819. In 1827, *J. Bottriell* died intestate, leaving *Thomas Bottriell* (the defendant in this action), his customary heir. *John Long* and *George Rylah* died before the commencement of this action.

Knoules for the plaintiff. There are two questions in this case. The first is, whether copyholds are within the statute (27 *Eliz. c. 4.*) against fraudulent conveyances; and, if they are, the other question is, whether the second surrender to, and admittance of *Tunstill*, are sufficient to bring the case within that statute. It must

be

be

be admitted, that *Doe v. Manning* (a) has established generally that a voluntary conveyance is a fraudulent one within the statute, and void as against a purchaser, although, before the purchase, he has notice of the voluntary conveyance. There is however this peculiarity in the present case; the same party takes under the voluntary conveyance as under the one for valuable consideration. Now the statute, by section 2., makes void all conveyances, &c., of any lands, tenements, or other hereditaments whatsoever, *for the intent and purpose to defraud and deceive such persons as shall purchase the same.*" The legislature, therefore, contemplates that, at the time when the voluntary conveyance is made, there exists an intention to deceive the party who afterwards purchase; that cannot be the case where the party taking by both conveyances is the same. A penalty is given by sect. 3.; and if this circumstance makes no difference, a case might be supposed where the party would have to pay the penalty to himself. Independently of that, copyholds are not within the words "lands, tenements, or other hereditaments" in that statute. It is true that, in *Doe v. Rouledge* (b), Lord Mansfield and Aston J. expressed an opinion that it did extend to copyholds; but it was not necessary, in that case, to decide the point. It was, therefore, a mere dictum; and Willes J. desired it might be observed that the Court gave no opinion on that question. In *Glover v. Cope* (c), it was stated in argument, but not decided, that copyholds are within that statute. In *Buller's N. P.*, p. 108., there is a dictum of Blencowe J. that copyholds are *not* within the statute. There are many cases where it has been held that copyholds or lease-

(a) 9 East, 59.

(b) Cooper, 705. Douglas, 716. note 1.

(c) 3 Lev. 326.

1833.
~~1833~~
 Doe dem.
 Tenant
 against
 Mortgagee
 Plaintiff

1833.

Dor dem.
TUNSTILL
against
BOTTRELL

holds do not pass by the general words "*lands or tenements.*" In *Rose v. Bartlett* (a) it was resolved, that if a man hath lands in fee and lands for years, and deviseth *all* his lands and tenements, the fee simple lands pass only, and not the lease for years. And before the statute 55 G. 3. c. 172., a general devise of lands, tenements, and hereditaments would not pass copyholds, unless the testator had shewn an intention to pass them by having made a previous surrender to the use of his will. Copyholds have been held not to be within the word lands in the statute, *De Donis Conditionalibus*, 13 Edw. 1. stat. 1. c. 1., or the statute of elegit, 13 Edw. 1. stat. 1. c. 18., or the statute 11 H. 7. c. 20. (b), relative to alienations by the wife of the *lands*, tenements, or other hereditaments, of her husband (c), or the statute 32 H. 8. c. 28., as to a discontinuance by the husband of the wife's land (c). [*Littledale J.* In *Comyns's Dig.* tit. *Copyhold*, N. and O., the general rule is laid down, that when no prejudice ensues to the lord by it, copyholds are included within the general words in any statute, *lands, tenements, and hereditaments*; but not when it alters the service, tenure, custom, or interest of the land, to the prejudice of the lord; and for that *Heydon's case* (d) is cited. [*Parke J.* The same rule is laid down in *Coke's Copyholder*, 151. Here I do not see how the lord's interest can be affected by the statute against fraudulent conveyances; for the purchaser must be admitted tenant, and pay his fine.] In *Matthews v. Feaver* (e), it was held that copyholds were not within the statute 13 Eliz. c. 5. s. 2., which renders void all conveyance of lands, tenements, here-

(a) *Cro. Car.* 292.(b) *Gilbert's Ten.* 186.(c) See 3 *Rep.* 8. a., 9. a. *Moore*, 596.(d) 3 *Co.* 7.(e) 1 *Cox Ch. Ca.* 278.

ditaments,

ditaments, made to defraud creditors. By the statute 27 *Eliz. c. 4. s. 3.* a penalty is imposed; it therefore creates an offence, and ought to be construed strictly. Secondly, *Tunstill* and *Rylah* were in by the first surrender. The surrenderor, for a valuable consideration, may revoke, but not if there be admittance on the first surrender (a). [*Parke J.* If the first surrender was void, the admittance under it was waste paper.]

1833.

DOE dem.
TUNSTALL
against
BOTTRELL.

Cresswell contra. The general words, "lands, tenements, and hereditaments," in the stat. 27 *Eliz. c. 4.* include copyholds. The dictum in *Buller's N. P.* is the only authority to the contrary; but in *Doe v. Routledge* (b) Lord Mansfield C. J. and Aston J. both expressed an opinion that they did; and, according to the rule laid down in *Heydon's case* (c), copyholds are included in such words, when used by the legislature, unless the statute alters the service, tenure, custom, or interest of the land, to the prejudice of the lord. In that case the question was, whether copyholds were included in the word *land* in the stat. 31 *H. 8. c. 13. s. 5.*? and it was held they were. So in *Kite* and *Queinton's case* (d), it was said by *Wray C. J.* they were within the words lands and tenements in stat. 32 *H. 8. c. 9.* against buying titles; and in the Dean and Chapter of *Worcester's case* (e), that they were within the words lands, tenements, and other hereditaments, in the stat. 13 *Eliz. c. 10. s. 3.*, as to ecclesiastical leases. So with respect to the statute of fines, 4 *H. 7. c. 24.*, as to fine and non claim; *Marg. Podger's case* (g). The stat.

(a) *Co. Copyholder*, 106. *Kilchen*, 160.(b) *Comp.* 705.(c) 3 *Rep.* 8. a.(d) 4 *Rep.* 26. a.(e) 6 *Rep.* 37. a.(g) 9 *Rep.* 104. a.

1888.

*Doe dem.
TUNSTALL
against
ROTTMILL.*

27 *Eliz. c. 4.* being passed to prevent fraud, must be construed liberally. Even the rule which exempts the king from the operation of statutes, does not prevail when the act is for the enlargement of right, or the prevention of wrong; and therefore the crown has been held to be bound by the 13 *Eliz. c. 10.* as to ecclesiastical leases, and the 31 *Eliz. c. 6.* against simony. As to *Matthews v. Feaver* (a), the Master of the Rolls held, that voluntary conveyances of copyholds were not void against creditors by the operation of the 13 *Eliz. c. 5.*; but that was not on the ground that they were not included within the general words of that statute, *lands, tenements, and hereditaments*, but because generally they were not subject to debts; and there an inquiry was directed to be made, whether, by the custom of the particular manor, copyholds were liable to debts? The Master of the Rolls must have been of opinion that if they were, they would come within the general words *lands, tenements, and hereditaments*, for otherwise the enquiry as to the custom of the manor would have been unnecessary. As to the argument here, that the voluntary conveyance, and that made for value, were to the same person, that is answered by the decision already referred to, that notice to the purchaser for value does not prevent the operation of the statute.

DENMAN C. J. The words of the act 27 *Eliz. c. 4.* are sufficiently large to include copyholds. In *Doe v. Routledge* (b) Lord Mansfield expressed an opinion that copyholds were within that statute; and, except the dictum of *Blencowe J.*, in *Buller's N. P.*, there is no authority the other way.

(a) 1 Cox Ch. Ca. 278.

(b) Comp. 705.

LITLEDALE J. The statute extends to copyholds. The general rule laid down in *Heydon's case* (a), and adopted in *Comyns's Dig. Copyhold, N.*, is applicable here, that when no prejudice ensues to the lord by it, copyholds are included within the general words *lands, tenements, and hereditaments*, in a statute.

1833.

—
Dox dem.
TUNWILL
against
BETTMILL.

PARKE J. I have no doubt in this case that the statute affects copyholds according to the general rule laid down in *Co. Copyholder* 53., and *Heydon's case* (b). As to *Matthew v. Feather* (c), the very reason there given by the Master of the Rolls, for saying that the statute did not extend to copyholds, shews that in a case where that reason had not applied, his opinion would have been that they are within the stat. 27 *Eliz. c. 4*. As to the second objection, that the plaintiff was a party to both conveyances, the answer is, that if the first conveyance was fraudulent, it was void from the first, although the subsequent purchaser had notice; *Doe v. Manning* (d). His knowledge was perfectly immaterial, and his subsequent admittance, on purchase for a valuable consideration, gave him a good title.

PATTESON J. I think the statute applies to copyholds: the words lands and tenements are sufficiently large to embrace them, and there is nothing to take them out of the enactment. In 2 *Watkins on Copyholds*, chap. 10., the matter is considered how far statutes apply to copyholds; and he adopts the rule laid down in *Heydon's case* (b), stating that "if the interest of the lord be not prejudiced; if no injury accrue to the copyholder any more than, under the same circumstances,

(a) 3 Co. 7.

(b) Rep. 7. a.

(c) 1 Cow Ch. Ca. 278.

(d) 9 East, 59.

would

1833.

DOR dem.
TUNSTALL
against
BOTTAMILL.

would accrue to the free; copyhold tenements must, equally with freehold, be within the public acts of the state." The present case is within the rule, and does not fall within any exception.

Judgment for the defendant.

Friday,
May 31st.

The Right Honourable GEORGE LORD OAKLEY
against The KENSINGTON Canal Company
and Others.

By acts of parliament enabling a company to make and maintain a canal navigation, and to take lands for that purpose, making satisfaction, it was provided, that the company should not take any garden ground without consent of the respective owners and occupiers, and that any action to be brought for any thing done in pursuance of those

CASE for wrongfully entering plaintiff's land in the occupation of a tenant, and digging and carrying away the soil, so that the said land was lowered and became overflowed with water; and for continuing the said land so lowered, whereby the same remained overflowed, and was diminished in value, to wit, from thenceforth, &c. Plea, the general issue. At the trial before *Patteson J.*, at the sittings in *Middlesex* after *Hilary* term 1832, the plaintiff was nonsuited, with leave to move to enter a verdict. On motion, the Court directed a special case to be stated. The case was in substance as follows:—

By statute, 5 G. 4. c. lxx., for making navigable a

acts, should be commenced within six calendar months next after the fact should have been committed; or if there should be a continuance of damages, then within six calendar months next after the committing of such damage should have ceased.

The company wishing to take garden ground for the purpose of sloping the banks of the canal, told the occupier, a tenant, that they had obtained the consent of the owner's agent, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land in consequence was from thenceforth overflowed by the *Thames* at every high tide. For this damage the landlord sued the company more than six calendar months after the ground was taken, and the tide first let in:

Held, that the injury was one for which an action should have been brought within six months from the taking away of the land; and that the defendants were within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statutes, though in the prosecution of that purpose, the defendants had been guilty of a misrepresentation to bad faith towards the occupier.

certain

certain creek from *Counter's Bridge* on the road from *London* to *Hammersmith*, to the river *Thames*, certain persons were incorporated by the name of the *Kensington Canal Company*, and were empowered (by sect. 2.) to enlarge the said creek, and make and maintain a canal for navigation; and for the purposes aforesaid, they were empowered (by the same section) to enter upon any lands and set out such parts thereof as they should think necessary for making the canal, and there to bore, dig, cut, trench, and drain, and to carry away the earth, &c. so dug, and to construct such works, &c. as they should think necessary or convenient for making, improving, &c. the canal, in pursuance of, and within the true intent and meaning of the act, making satisfaction, as after mentioned, to the owners or proprietors, tenants or occupiers of the lands, for all damages to be by them sustained in or by the execution of all or any of the powers of that act. And that act was to be an indemnity to the company and their servants for what they should do by virtue of the powers thereby granted, subject to the provisoes and restrictions thereafter mentioned.

Section 7. provided, that nothing in the act should extend to empower the company, or any other person, to take or use any *garden*, &c. without the consent in writing of the respective owners and occupiers thereof, except such as were specified in a schedule to the act.

Section 16. enacted, that owners and occupiers, &c. should receive satisfaction for the value of their lands, &c., and for the damages to be sustained in making and completing the works before directed, in gross sums, as should be agreed upon between them and the company; and immediately after the executing of the sale and conveyance, or contract for the same, the company should
be

1833.

Lord OAKLEY
against
The
Kensington
Canal
Company.

1833.

Lord OAKLEY
against
The
KENNINGTON
Canal
Company.

be at liberty to enter upon, and for ever have, take, and enjoy the lands, &c. for the use and maintenance of the canal; and if the parties could not agree as to the amount of satisfaction, the same was to be settled by a jury. Section 25. contained further provisions respecting the satisfaction to be made for lands, and the rights of the company on payment or tender.

By section 22. it was enacted, "That the said company shall not be obliged by virtue of this act to receive or take notice of any complaint or complaints to be made by any person or persons whomsoever, for any injury or damage by him, her, or them sustained, or supposed to be sustained, by virtue or in consequence of this act, unless notice in writing shall have been given in relation thereto by or on the behalf of such person or persons to the said canal company, within the space of six calendar months next after the time that such supposed injury or damage shall have been sustained, or such supposed injury or damage shall have ceased."

Sect. 116. enacted, that if any person should sustain any damage in his lands, &c., by the execution of any of the powers given by the act, for which compensation was not before provided, such damage should be ascertained by a jury, as therein directed, and the amount recovered and applied as in the cases before provided for.

By sect. 128. it was enacted, "That if any action, suit, or information shall be brought or commenced by any person for any thing *done or to be done in pursuance of this act, or in execution of the powers and authorities, or the orders and directions hereinbefore given or granted*, every such suit or information shall be brought or commenced *within six calendar months* next after the fact shall have been committed, or, in case there shall be a continuance of damages, then within

six calendar months next after the doing or committing of such damage shall have ceased, and not afterwards ;”

— “and the defendant, in such action or suit, shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by authority of this act ; and if it shall appear to have been so done, or if any action, suit, or information shall be brought after the time so limited for bringing the same, then and in such case the jury shall find for the defendant.”

The schedule to this act did not include the lands mentioned in the declaration.

By an act 7 G. 4. c. xcvi. (*May* 1826), for amending the former, it was provided (sect. 1.) that all and every the powers, provisions, and authorities contained in the former statute (except as by this act altered or repealed), should be applicable to that statute as if now repeated, and that the two should be construed as one. Powers were then given (sect. 2.) to the company to slope the banks of the canal, making compensation to the owners and occupiers of land which should be required for that purpose ; but, by sect. 5., nothing in the act was to authorize the company to take or injure any land for the last-mentioned purpose, without the consent in writing of the respective owners and occupiers, except such lands as were specified in a schedule to that act.

It did not appear by the case that the lands in question were in this schedule. Each of the statutes had a clause enacting that it should be deemed and taken to be a public act.

The land in question was garden ground, in the occupation of *Thomas Adam*, the plaintiff being the reversioner. In 1825 the canal company took part of it for the

1833.

Lord OAKLEY
against
The
KENNINGTON
Canal
Company.

1833.

Lord OAKLEY
against
The
Kensington
Canal
Company.

the purpose of sloping the bank, making the tenant a compensation, and further promising him 67*l.* for the crops which he then had upon the land so taken. In 1827 they applied to him to be allowed to cut away more of the land for the same purpose; but he refused permission, unless the company obtained the consent of Mr. *Lee*, Lord *Oakley's* solicitor, and Mr. *Handford*, his surveyor, and paid him (*Adam*) the 67*l.* They told him they had got the consent of the gentlemen named, and they paid the 67*l.*; after which, in *September* 1827, they entered upon the land, and dug it away, for the purpose of sloping the banks, lowering it to such an extent that, at the next and every high tide afterwards, the river *Thames* flowed in and covered it, and rendered it incapable of cultivation. Neither Mr. *Lee* nor Mr. *Handford* had ever given consent to the proceedings. No notice of complaint was given by the plaintiff till *January* 1831, more than four years after the land was sloped away, and the tide first flowed over it. The defendants insisted that the case was within the compensation clause, s. 116.; and, if not, that the damage accrued when the land was sloped away, and the action ought to have been brought within six months after that time. The plaintiff contended that the damage was a continuing injury, and had not ceased within six calendar months before the action was brought; and also that the defendants had not acted as persons who considered themselves really and bonâ fide pursuing the authority given by the statutes, but had been guilty of a fraud upon the occupier of the land, and were not protected by the restrictive clauses. The case was now argued by

R. Bayly, for the plaintiff. The acts of parliament, though declared to be public, are substantially private,
and

and operate in derogation of private rights. They must, therefore, be construed strictly. (This was not disputed.) *Boothby v. Morton* (a) may be relied upon as an authority against the present action; but there it was only held that the commissioners could not be sued at any unlimited time; and it did not appear, nor did the Court presume, that they had contravened the provisions of the act. *The Governor and Company of the British Cast Plate Manufacturers v. Meredith* (b) was cited at the trial; but there the statute under which the defendants proceeded had a clause authorising the commissioners of paving (under whom they acted) to make satisfaction for injuries done; and this was relied upon by the Court. Besides, the express proviso here, that the company shall not take garden ground without a written consent, distinguishes the present case. And by s. 2. of 5 G. 4. c. lxx., they had no right to enter upon the land without making satisfaction for damages to be sustained. Section 116. does not apply to this case, because it is one for which compensation is before provided in the act. The defendants must, therefore, rely on section 128., and the protection of that clause extends only to acts done bonâ fide in pursuance of the statute. The conduct of the defendants here, shews that they did not act bonâ fide. In *Daniel v. Wilson* (c), *Gaby v. The Wiltshire Canal Company* (d), *Theobald v. Crichmore* (e), and *Graves v. Arnold* (g), where protecting clauses like the present were held applicable to parties exceeding their authority, the defendants had acted under a supposition that they were doing right,

1833.

Lord OAKLEY
against
The
KENSINGTON
Canal
Company.

(a) 3 B. & B. 239.

(c) 5 T. R. 1.

(e) 1 B. & A. 227

(b) 4 T. R. 794.

(d) 3 M. & S. 580.

(g) 3 Camp. 242.

and

1893.

Lord OAKLEY
against
The
KILMARNOCK
Canal
Company.

and only erred from inadvertence. Here they were guilty of a wilful deception. There was in this case a damage within six calendar months by the overflowing of the land, in respect of which the plaintiffs might sue. *Roberts v. Read (a)*, *Wordsworth v. Harley (b)*, is distinguishable. There the reversioner of land declared against defendant (who was a surveyor of highways) for digging his close and separating a portion of it from the residue, and keeping it so separated, and adding such portion to the public road. The separation was by a wall, which was begun more than three calendar months before the action brought; it was at that time very low, but it still formed a complete division between the parcels of land. After the commencement of the three months, the wall was raised and finished; and it was held, that the separation having been complete before that period, the raising of the wall was not such a new injury as would take the case out of the limitation in 13 G. 3. c. 78. s. 81., which required actions for any thing done in pursuance of that statute to be commenced within three calendar months after the fact committed. Here there was a new injury within six months.

Thesiger, contra, was stopped by the Court.

DENMAN C. J. No sufficient reason is given why the action should not have been brought within the six calendar months. The limitation is a beneficial one, and should be adhered to. The words, "any thing done or to be done in pursuance of this act, or in execution of the powers and authorities" thereby given and

(a) 16 East, 215.

(b) 1 B. & Ad. 391.

granted,

granted, must be taken to mean something done in prosecution of the works contemplated, and not merely making the act a colour. The conduct of the company cannot be approved of, but the action is commenced too late. The plaintiff had notice of the injury, and might have proceeded sooner.

1838.

Lord OAKLEY
against
The
Kensington
Canal
Company.

LITLEDALE J. I am of opinion that this is a case in which the defendants are entitled to protection, though they have exceeded their authority.

PARKE J. The statute 5 G. 4, c. lxxv. s. 128., requires the action to be commenced within six calendar months next after the fact shall have been committed, or, in case there shall be a continuance of damages, then within six calendar months after the doing of such damage shall have ceased. Here the action might have been brought, and the tenant have recovered a proper compensation, within six months after the land was taken away. The words "any thing done in pursuance of this act, or in execution of the powers," &c., apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as a cloak for their own private purposes. Although the defendants here misrepresented facts to the tenant, that makes no difference in the application of the clause.

PATTESON J. I am of the same opinion. The injury was complete when the land was taken.

Judgment for the defendants.

1833.

Friday,
May 31st.

HARRISON and Another, Assignees, against
WARDLE and Others.

Declaration of
Easter term
1831, on a re-
plevin bond, by
the assignees
of the sheriff
against *W.*, the
plaintiff in re-
plevin, and his
sureties, after
stating the con-
dition, assigned
as a breach,
“that although
the suit was re-
moved into
K. B. by re. fa.
returnable
in Michaelmas
term 1829, at

DECLARATION in debt, entitled of *Easter term*
1831, by the plaintiffs, as assignees of *John Bate-*
man, sheriff of the county of *Stafford*, stated, that on
the 21st of *April* 1829, the plaintiffs distrained the
goods of the defendant *Wardle* for money then due
from him to *J. Ault*, one of the plaintiffs, for rent; that
Wardle, within five days, made his plaint to the said
J. B., then being sheriff of the county aforesaid, out of
the county court of the said sheriff, of the taking and
unjustly detaining of the goods of the defendant *Wardle*,

the instance of *W.*, the plaintiff in replevin, yet he did not prosecute his suit with effect and without delay.” Plea, first, that by the re. fa. lo. the sheriff was commanded to record the plaint, to have the record on the return day in K. B., and to prefix the same day to the parties, that they might be ready to proceed in the said plaint; that *W.*, the plaintiff in replevin, appeared in court at the return, and was ready to proceed in the suit, and prosecute the same with effect and without delay, but that the now plaintiffs did not appear, and the sheriff returned to the re. fa. lo., amongst other things, that he had prefixed the same day to the parties that they might be ready there to proceed in the said plaint. It then averred that *W.* was always ready to prosecute his plaint with effect, and without delay, and would have done so if the defendants in replevin (the now plaintiffs), had appeared. To this plea there was a general demurrer.

The second plea stated that the sheriff, in pursuance of the re. fa. lo., recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the now plaintiffs to appear in K. B. to proceed in the plaint; and that *W.*, the plaintiff in replevin, was ready to proceed, but the now plaintiffs did not appear. Replication, that the sheriff did not summon the now plaintiffs to appear. Rejoinder, by way of estoppel, that the sheriff, before the assignment, returned to the re. fa. lo. that he had prefixed a day to the parties that they might be ready to proceed in the plaint. General demurrer.

Held, first, that a plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined.

Secondly, admitting that upon the replication to the second plea it was to be assumed that the now plaintiffs were not summoned, (and semble that, in the present action, they were not estopped from alleging this,) still, as it appeared by the pleas that the re. fa. lo. contained a direction in effect to summon the now plaintiffs, *W.*, the plaintiff in replevin, was not responsible for the default of the sheriff, or guilty of delay in that suit by reason of the sheriff having neglected to serve a summons.

and

and prayed the sheriff that the same might be replevied by him (the sheriff) and delivered to *Wardle*; and thereupon the said *J. B.*, so being sheriff, &c., did take from *Wardle*, and from the other defendants as two responsible sureties, a bond in double the value of the goods distrained, &c., and the defendants in this suit, on the 23d of *April* 1829, by their writing obligatory, acknowledged themselves to be bound unto the said *J. B.*, so being sheriff, &c., in 146*l.*, to be paid to the said *J. B.*, &c., with a condition thereunder written, "that if the defendant *Wardle* should appear at the then next county court, to wit, at the county court of the said sheriff, on the 7th of *May* then next, and should then and there prosecute his action with effect and without delay, against the said plaintiffs in this suit, for taking and unjustly detaining the goods in the condition mentioned, and should make a return of the said goods, if a return thereof should be awarded, then the obligation should be void, or otherwise it should remain in full force;" that the sheriff, at the prayer of the defendant *Wardle*, replevied and made deliverance of the goods to him; and afterwards, at the then next County Court of the said sheriff, *Wardle* appeared, and, without writ, levied his plaint against the plaintiffs in this suit, for the taking and unjustly detaining of the said goods, and then and there found pledges, as well for prosecuting his said plaint as for returning the said goods, if return thereof should be adjudged by law, to wit, the other two defendants, which plaint, in *Michaelmas* term 1829, was duly removed, at the instance of *Wardle*, out of the County Court of the said sheriff into the Court of King's Bench, by virtue of a writ of recordari facias loquelam, returnable on the morrow of *All Souls*. Averment, that

1833.

HARRISON
against
WARDLE.

1833.

HARRISON
against
WARDLE.

Wardle did not prosecute his aforesaid suit in the Court of K. B. with effect and without delay against the plaintiffs in this action, for taking and detaining the goods aforesaid, nor had he further prosecuted such suit, nor did he make a return of the said goods, or any part thereof, according to the form and effect of the said writing obligatory, whereby the same became forfeited to the sheriff, who assigned it to the plaintiffs.

Plea 1st, that by the writ of re. fa. lo. the sheriff was commanded that he should cause the plaint to be recorded, and that he should have the record in K. B. on the morrow of *All Souls*, and that he should prefix the same day to the parties, that they might then be there ready to proceed in the said plaint, as should be just; that at the return of the re. fa. lo., *Wardle* came into the Court of K. B., and was then and there ready to proceed in the said suit, and to prosecute the same with effect and without delay against the now plaintiffs; but that the said now plaintiffs came not, and did not appear in the said Court of K. B.; and the said sheriff, on the morrow of *All Souls*, returned to the said Court of K. B., upon the said writ of re. fa. lo., that, by virtue of that writ, he had caused the plaint to be recorded, &c., and had the said record in Court on the day in the writ mentioned, *and that he had prefixed the said day to the said parties, that they might be there ready to proceed in the said plaint* as should be just, as in the said writ he, the sheriff, was commanded. The plea then averred, that *Wardle* was always ready to prosecute his action with effect, and without delay, against the now plaintiffs; and would have so prosecuted his suit against the said now plaintiffs, if they had appeared in the Court of K. B., according to the exigency
of

of the writ; but that the said plaintiffs did not, nor would, appear in K. B. on the day prefixed to them by the sheriff for that purpose, or at any other time, but wholly neglected and refused so to do, and had not as yet appeared to the said writ.

Plea 2d, that the sheriff, in pursuance of the writ of re. fa. lo. mentioned in the declaration, recorded the plaint, returned it, prefixed the day of the return to both parties, and *summoned the* (now) *plaintiffs* to appear in the *King's Bench* to proceed in the plaint; and that *Wardle* was ready to proceed, but the plaintiffs did not appear, as before.

To the first plea there was a general demurrer; to the second a replication, that the sheriff *did not summon the plaintiffs to appear*, as in the plea alleged, concluding to the country.

To this there was a rejoinder, by way of estoppel, that the plaintiffs ought not to be admitted so to reply, because the sheriff, before the assignment, returned to the re. fa. lo., "that he had prefixed a day to the parties, that they might be ready to proceed in the plaint, as he was commanded." General demurrer to the rejoinder.

This case was argued in *Easter term* (a).

R. V. Richards in support of the demurrers. The first plea is insufficient, because it merely shews that *Wardle* appeared in Court at the return of the writ, and was ready to proceed in the suit, and prosecute the same with effect, without shewing that he did so, or how the suit was disposed of. It states further, that the sheriff returned that he had prefixed a day to the parties, that they

1833.

HARRISON
against
WARDLE

(a) Before Denman C. J., Littledale and Parke Js.

1833.

HARRISON
against
WARDLE.

might be ready to proceed with the plaint, but it does not allege that the sheriff had in fact summoned the defendants in replevin to appear. In *Dalton's Office of Sheriffs*, p. 272., it is said, "that the sheriff is first to record the suit in full court, and then to return the same under his own seal, and the seals of four suitors of the same court, and after, the sheriff is to summon the defendant to be there at the day of the return thereof." It was the duty of the sheriff, therefore, to summon the defendants; and the duty of the obligor of the bond was to see that it was done. In *Brackenbury v. Pell* (a), where the plea to a declaration on a replevin bond stated, that the suit was still depending and undetermined; and the plaintiff replied, "that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending;" on special demurrer it was held, that the replication was insufficient, for not shewing how the suit was determined and had ceased to depend. In *Morgan v. Griffith* (b), it was said by Lee C. J., "that in all replevin bonds there are several independent conditions," one of which is to prosecute with effect, and a breach may be assigned on non-performance of any. *Gwillim v. Holbrook* (c), and *Axford v. Perrett* (d), shew that the condition of a replevin bond is not satisfied by a prosecution of the suit in the county court; but the plaint, if removed by re. fa. lo. into a superior court, must be prosecuted there with effect and without delay. And it appears from *Vaughan v. Norris* (e), and *Turnor v. Turner* (g), that the plaintiff in a replevin suit so removed, by becoming

(a) 12 East, 585.

(b) 7 Mod. 380.

(c) 1 Bos. & P. 410.

(d) 4 Bing. 586.

(e) Cas. temp. Hardw. 137.

(g) 2 Brod. & B. 107.

nonsuit,

nonsuit, fails to prosecute his suit with effect. The rejoinder to the replication to the second plea is bad, because the sheriff's return to the re. fa. lo. is no estoppel in this action, which is not between the same parties as the replevin suit, for the sureties in the replevin bond were no parties to the suit in replevin.

1838.

 HARRISON
 against
 WARDLE.

Follett contra *Wardle*, the plaintiff in replevin, having appeared in Court at the return of the writ, and been then ready to prosecute his suit with effect, has done all that, by law, he was required to do. It is true that the conditions of the bond are distinct and independent. But assuming that it was the duty of the sheriff to summon the defendant in replevin, he returned that he had prefixed the same day (i. e., the day of the return of the re. fa. lo.) to the parties, that they might be ready to proceed with the suit in the court above. From that it may be inferred, that he had summoned the defendants in replevin, as his duty was; and, if so, it then was their duty to enter an appearance. The question is, whether, when the defendant in replevin does not appear on the return of the re. fa. lo., the plaintiff is bound to take any other step. [*Parke J.* If the defendants did not appear, the plaintiff in replevin might have sued out a *distringas* to compel them. By the condition of the bond, he is bound to do all he can to prosecute his suit with effect, and without delay.] The general rule is, that the condition of the bond is not broken, until the action be determined in favour of the landlord, *Brackenbury v. Pell* (a). It lies on the plaintiffs here to shew that it was legally determined in their favour, so as to

(a) 12 *East*, 585.

1833.

HARRISON
against
WARDLE.

establish the breach alleged, that it was not prosecuted with effect. In *The Duke of Ormond v. Bierly* (a), the breach assigned was, that the action brought on a replevin bond was not prosecuted with effect. The defendant pleaded, that *E. G.* levied a plaint in replevin, and died before the suit was determined, whereby the suit abated: the plaintiff replied, that although *E. G.* levied such a plaint against the defendant, the defendant, by injunction, hindered the proceedings until *E. G.* died. Upon demurrer to the replication, the defendant had judgment, for per *Holt* C. J. "This was a prosecution with effect, because there was neither a nonsuit nor verdict against *E. Y.*" In *Vaughan v. Norris* (b), and *Turnor v. Turner* (c), the plaintiff in replevin was nonsuited, and the action was thereby terminated. It appears, therefore, plainly established, that the suit must be determined against the tenant before it can be said that there is any breach of the condition of the bond. In *Brackenbury v. Pell* (d), a replication, stating that the replevin suit was abandoned, without shewing how, was held to be bad on special demurrer. In *Axford v. Perrett* (e), it appeared that the defendant had taken no step in the replevin cause for more than two years; and after verdict for the plaintiff it was held, that after the time which had elapsed without any proceedings, the replevin cause, by analogy to the practice of the higher tribunals, was out of Court; but here there is nothing to shew that the cause is not depending. The plaintiff ought to have shewn that it was actually determined. [*Parke* J. Where the breach assigned is that the plaintiff in replevin did not pro-

(a) *Curth.* 519.(b) *Cas. temp. Hardw.* 137.(c) 2 *Brod. & B.* 107.(d) 12 *East*, 585.(e) 4 *Bing.* 586.

secute his suit with effect, it is a sufficient answer to shew that that suit is still pending; but it is no answer where the breach also is, as in this case, that he did not prosecute it without delay.] The plea shews, that the delay arose from the act of the plaintiffs. Then, as to the rejoinder to the replication to the second plea, the plaintiffs are assignees of the sheriff; and if he would be estopped by his return, in an action on the replevin bond, they must also be. Having returned that he has prefixed a day to both parties to be in Court to prosecute their suit, he would be thereby estopped from saying that he did not summon either of them. Assuming, however, that the return is not an estoppel in this action, and that it must be taken, on the replication to the second plea, that the plaintiffs were not summoned to appear in the Court of King's Bench; still, as the plea shews that the sheriff was commanded by the re. fa. lo. to have the record in the King's Bench on the morrow of *All Souls*, and to prefix the same day to the parties, that then they might be ready to proceed in the plaint, his omission to summon the plaintiffs to appear in the King's Bench is his default, and not that of *Wardle*. The latter, therefore, has not committed a breach of the condition to prosecute his suit without delay; for the plea alleges that he was ready to prosecute it.

1853.

HARRISON
against
WARDLE.

Richards in reply. The replevin suit was removed into the Court of King's Bench in *Michaelmas* term 1829. The plaintiff in replevin having since taken no proceedings in the suit, has committed a breach of the condition of the bond by not prosecuting without delay. In *Axford v. Perrett (a)*, where the plaintiff in

(a) 4 Bing. 586.

replev

1833.

Lord OAKLEY
against
The
Kensington
Canal
Company.

and only erred from inadvertence. Here they were guilty of a wilful deception. There was in this case a damage within six calendar months by the overflowing of the land, in respect of which the plaintiffs might sue. *Roberts v. Read (a)*, *Wordsworth v. Harley (b)*, is distinguishable. There the reversioner of land declared against defendant (who was a surveyor of highways) for digging his close and separating a portion of it from the residue, and keeping it so separated, and adding such portion to the public road. The separation was by a wall, which was begun more than three calendar months before the action brought; it was at that time very low, but it still formed a complete division between the parcels of land. After the commencement of the three months, the wall was raised and finished; and it was held, that the separation having been complete before that period, the raising of the wall was not such a new injury as would take the case out of the limitation in 13 G. 3. c. 78. s. 81., which required actions for any thing done in pursuance of that statute to be commenced within three calendar months after the fact committed. Here there was a new injury within six months.

Thesiger, contra, was stopped by the Court.

DENMAN C. J. No sufficient reason is given why the action should not have been brought within the six calendar months. The limitation is a beneficial one, and should be adhered to. The words, "any thing done or to be done in pursuance of this act, or in execution of the powers and authorities" thereby given and

(a) 16 East, 215.

(b) 1 B. & Ad. 391.

granted,

granted, must be taken to mean something done in prosecution of the works contemplated, and not merely making the act a colour. The conduct of the company cannot be approved of, but the action is commenced too late. The plaintiff had notice of the injury, and might have proceeded sooner.

1838.

Lord OAKLEY
against
The
Kensington
Canal
Company.

LITLEDALE J. I am of opinion that this is a case in which the defendants are entitled to protection, though they have exceeded their authority.

PARKE J. The statute 5 G. 4, c. lxxv. s. 128., requires the action to be commenced within six calendar months next after the fact shall have been committed, or, in case there shall be a continuance of damages, then within six calendar months after the doing of such damage shall have ceased. Here the action might have been brought, and the tenant have recovered a proper compensation, within six months after the land was taken away. The words "any thing done in pursuance of this act, or in execution of the powers," &c., apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as a cloak for their own private purposes. Although the defendants here misrepresented facts to the tenant, that makes no difference in the application of the clause.

PATTESON J. I am of the same opinion. The injury was complete when the land was taken.

Judgment for the defendants.

1833.

Friday,
May 31st.HARRISON and Another, Assignees, against
WARDLE and Others.

Declaration of
Easter term
1831, on a re-
plevin bond, by
the assignees
of the sheriff
against *W.*, the
plaintiff in re-
plevin, and his
sureties, after
stating the con-
dition, assigned
as a breach,
"that although
the suit was re-
moved into
K. B. by re. fa.
returnable

in Michaelmas
term 1829, at

the instance of *W.*, the plaintiff in replevin, yet he did not prosecute his suit with effect and without delay." Plea, first, that by the re. fa. lo. the sheriff was commanded to record the plaint, to have the record on the return day in K. B., and to prefix the same day to the parties, that they might be ready to proceed in the said plaint; that *W.*, the plaintiff in replevin, appeared in court at the return, and was ready to proceed in the suit, and prosecute the same with effect and without delay, but that the now plaintiffs did not appear, and the sheriff returned to the re. fa. lo., amongst other things, that he had prefixed the same day to the parties that they might be ready there to proceed in the said plaint. It then averred that *W.* was always ready to prosecute his plaint with effect, and without delay, and would have done so if the defendants in replevin (the now plaintiffs), had appeared. To this plea there was a general demurrer.

The second plea stated that the sheriff, in pursuance of the re. fa. lo., recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the now plaintiffs to appear in K. B. to proceed in the plaint; and that *W.*, the plaintiff in replevin, was ready to proceed, but the now plaintiffs did not appear. Replication, that the sheriff did not summon the now plaintiffs to appear. Rejoinder, by way of estoppel, that the sheriff, before the assignment, returned to the re. fa. lo. that he had prefixed a day to the parties that they might be ready to proceed in the plaint. General demurrer.

Held, first, that a plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined.

Secondly, admitting that upon the replication to the second plea it was to be assumed that the now plaintiffs were not summoned, (and semble that, in the present action, they were not estopped from alleging this,) still, as it appeared by the pleas that the re. fa. lo. contained a direction in effect to summon the now plaintiffs, *W.*, the plaintiff in replevin, was not responsible for the default of the sheriff, or guilty of delay in that suit by reason of the sheriff having neglected to serve a summons.

and

and prayed the sheriff that the same might be replevied by him (the sheriff) and delivered to *Wardle*; and thereupon the said *J. B.*, so being sheriff, &c., did take from *Wardle*, and from the other defendants as two responsible sureties, a bond in double the value of the goods distrained, &c., and the defendants in this suit, on the 23d of *April* 1829, by their writing obligatory, acknowledged themselves to be bound unto the said *J. B.*, so being sheriff, &c., in 146*l.*, to be paid to the said *J. B.*, &c., with a condition thereunder written, "that if the defendant *Wardle* should appear at the then next county court, to wit, at the county court of the said sheriff, on the 7th of *May* then next, and should then and there prosecute his action with effect and without delay, against the said plaintiffs in this suit, for taking and unjustly detaining the goods in the condition mentioned, and should make a return of the said goods, if a return thereof should be awarded, then the obligation should be void, or otherwise it should remain in full force;" that the sheriff, at the prayer of the defendant *Wardle*, replevied and made deliverance of the goods to him; and afterwards, at the then next County Court of the said sheriff, *Wardle* appeared, and, without writ, levied his plaint against the plaintiffs in this suit, for the taking and unjustly detaining of the said goods, and then and there found pledges, as well for prosecuting his said plaint as for returning the said goods, if return thereof should be adjudged by law, to wit, the other two defendants, which plaint, in *Michaelmas* term 1829, was duly removed, at the instance of *Wardle*, out of the County Court of the said sheriff into the Court of King's Bench, by virtue of a writ of recordari facias loquelam, returnable on the morrow of *All Souls*. Averment, that

1833.

HARRISON
against
WARDLE.

1833.

HARRISON
against
WARDLE.

Wardle did not prosecute his aforesaid suit in the Court of K. B. with effect and without delay against the plaintiffs in this action, for taking and detaining the goods aforesaid, nor had he further prosecuted such suit, nor did he make a return of the said goods, or any part thereof, according to the form and effect of the said writing obligatory, whereby the same became forfeited to the sheriff, who assigned it to the plaintiffs.

Plea 1st, that by the writ of re. fa. lo. the sheriff was commanded that he should cause the plaint to be recorded, and that he should have the record in K. B. on the morrow of *All Souls*, and that he should prefix the same day to the parties, that they might then be there ready to proceed in the said plaint, as should be just; that at the return of the re. fa. lo., *Wardle* came into the Court of K. B., and was then and there ready to proceed in the said suit, and to prosecute the same with effect and without delay against the now plaintiffs; but that the said now plaintiffs came not, and did not appear in the said Court of K. B.; and the said sheriff, on the morrow of *All Souls*, returned to the said Court of K. B., upon the said writ of re. fa. lo., that, by virtue of that writ, he had caused the plaint to be recorded, &c., and had the said record in Court on the day in the writ mentioned, *and that he had prefixed the said day to the said parties, that they might be there ready to proceed in the said plaint* as should be just, as in the said writ he, the sheriff, was commanded. The plea then averred, that *Wardle* was always ready to prosecute his action with effect, and without delay, against the now plaintiffs; and would have so prosecuted his suit against the said now plaintiffs, if they had appeared in the Court of K. B., according to the exigency of
of

of the writ; but that the said plaintiffs did not, nor would, appear in K. B. on the day prefixed to them by the sheriff for that purpose, or at any other time, but wholly neglected and refused so to do, and had not as yet appeared to the said writ.

Plea 2d, that the sheriff, in pursuance of the writ of re. fa. lo. mentioned in the declaration, recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the (now) plaintiffs to appear in the *King's Bench* to proceed in the plaint; and that *Wardle* was ready to proceed, but the plaintiffs did not appear, as before.

To the first plea there was a general demurrer; to the second a replication, that the sheriff *did not summon the plaintiffs to appear*, as in the plea alleged, concluding to the country.

To this there was a rejoinder, by way of estoppel, that the plaintiffs ought not to be admitted so to reply, because the sheriff, before the assignment, returned to the re. fa. lo., "that he had prefixed a day to the parties, that they might be ready to proceed in the plaint, as he was commanded." General demurrer to the rejoinder.

This case was argued in *Easter* term (a).

R. V. Richards in support of the demurrers. The first plea is insufficient, because it merely shews that *Wardle* appeared in Court at the return of the writ, and was ready to proceed in the suit, and prosecute the same with effect, without shewing that he did so, or how the suit was disposed of. It states further, that the sheriff returned that he had prefixed a day to the parties, that they

1833.

HARRISON
against
WARDLE

(a) Before Denman C. J., Littledale and Parke Js.

1833.

HARRISON
against
WARDLE.

might be ready to proceed with the plaint, but it does not allege that the sheriff had in fact summoned the defendants in replevin to appear. In *Dalton's Office of Sheriffs*, p. 272., it is said, "that the sheriff is first to record the suit in full court, and then to return the same under his own seal, and the seals of four suitors of the same court, and after, the sheriff is to summon the defendant to be there at the day of the return thereof." It was the duty of the sheriff, therefore, to summon the defendants; and the duty of the obligor of the bond was to see that it was done. In *Brackenbury v. Pell* (a), where the plea to a declaration on a replevin bond stated, that the suit was still depending and undetermined; and the plaintiff replied, "that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending;" on special demurrer it was held, that the replication was insufficient, for not shewing how the suit was determined and had ceased to depend. In *Morgan v. Griffith* (b), it was said by Lee C. J., "that in all replevin bonds there are several independent conditions," one of which is to prosecute with effect, and a breach may be assigned on non-performance of any. *Gwillim v. Holbrook* (c), and *Axford v. Perrett* (d), shew that the condition of a replevin bond is not satisfied by a prosecution of the suit in the county court; but the plaint, if removed by re. fa. lo. into a superior court, must be prosecuted there with effect and without delay. And it appears from *Vaughan v. Norris* (e), and *Turnor v. Turner* (g), that the plaintiff in a replevin suit so removed, by becoming

(a) 12 East, 585.

(b) 7 Mod. 380.

(c) 1 Bos. & P. 410.

(d) 4 Bing. 586.

(e) Cas. temp. Hardw. 137.

(g) 2 Brod. & B. 107.

nonsuit,

nonsuit, fails to prosecute his suit with effect. The rejoinder to the replication to the second plea is bad, because the sheriff's return to the re. fa. lo. is no estoppel in this action, which is not between the same parties as the replevin suit, for the sureties in the replevin bond were no parties to the suit in replevin.

1838.

HARRISON
against
WARDLE.

Follett contra. *Wardle*, the plaintiff in replevin, having appeared in Court at the return of the writ, and been then ready to prosecute his suit with effect, has done all that, by law, he was required to do. It is true that the conditions of the bond are distinct and independent. But assuming that it was the duty of the sheriff to summon the defendant in replevin, he returned that he had prefixed the same day (i. e., the day of the return of the re. fa. lo.) to the parties, that they might be ready to proceed with the suit in the court above. From that it may be inferred, that he had summoned the defendants in replevin, as his duty was; and, if so, it then was their duty to enter an appearance. The question is, whether, when the defendant in replevin does not appear on the return of the re. fa. lo., the plaintiff is bound to take any other step. [*Parke J.* If the defendants did not appear, the plaintiff in replevin might have sued out a *distringas* to compel them. By the condition of the bond, he is bound to do all he can to prosecute his suit with effect, and without delay.] The general rule is, that the condition of the bond is not broken, until the action be determined in favour of the landlord, *Brackenbury v. Pell* (a). It lies on the plaintiffs here to shew that it was legally determined in their favour, so as to

(a) 12 *East*, 585.

1833.

HARRISON
against
WARDLY.

establish the breach alleged, that it was not prosecuted with effect. In *The Duke of Ormond v. Bierly* (a), the breach assigned was, that the action brought on a replevin bond was not prosecuted with effect. The defendant pleaded, that *E. G.* levied a plaint in replevin, and died before the suit was determined, whereby the suit abated: the plaintiff replied, that although *E. G.* levied such a plaint against the defendant, the defendant, by injunction, hindered the proceedings until *E. G.* died. Upon demurrer to the replication, the defendant had judgment, for per *Holt C. J.* "This was a prosecution with effect, because there was neither a nonsuit nor verdict against *E. Y.*" In *Vaughan v. Norris* (b), and *Turnor v. Turner* (c), the plaintiff in replevin was nonsuited, and the action was thereby terminated. It appears, therefore, plainly established, that the suit must be determined against the tenant before it can be said that there is any breach of the condition of the bond. In *Brackenbury v. Pell* (d), a replication, stating that the replevin suit was abandoned, without shewing how, was held to be bad on special demurrer. In *Asford v. Perrett* (e), it appeared that the defendant had taken no step in the replevin cause for more than two years; and after verdict for the plaintiff it was held, that after the time which had elapsed without any proceedings, the replevin cause, by analogy to the practice of the higher tribunals, was out of Court; but here there is nothing to shew that the cause is not depending. The plaintiff ought to have shewn that it was actually determined. [*Parke J.* Where the breach assigned is that the plaintiff in replevin did not pro-

(a) *Carth.* 519.(b) *Cas. temp. Hardw.* 137.(c) 2 *Brod. & B.* 107.(d) 12 *East*, 585.(e) 4 *Bing.* 586.

secute his suit with effect, it is a sufficient answer to shew that that suit is still pending; but it is no answer where the breach also is, as in this case, that he did not prosecute it without delay.] The plea shews, that the delay arose from the act of the plaintiffs. Then, as to the rejoinder to the replication to the second plea, the plaintiffs are assignees of the sheriff; and if he would be estopped by his return, in an action on the replevin bond, they must also be. Having returned that he has prefixed a day to both parties to be in Court to prosecute their suit, he would be thereby estopped from saying that he did not summon either of them. Assuming, however, that the return is not an estoppel in this action, and that it must be taken, on the replication to the second plea, that the plaintiffs were not summoned to appear in the Court of King's Bench; still, as the plea shews that the sheriff was commanded by the re. fa. lo. to have the record in the King's Bench on the morrow of *All Souls*, and to prefix the same day to the parties, that then they might be ready to proceed in the plaint, his omission to summon the plaintiffs to appear in the King's Bench is his default, and not that of *Wardle*. The latter, therefore, has not committed a breach of the condition to prosecute his suit without delay; for the plea alleges that he was ready to prosecute it.

1853.

HARRISON
against
WARDLE.

Richards in reply. The replevin suit was removed into the Court of King's Bench in *Michaelmas* term 1829. The plaintiff in replevin having since taken no proceedings in the suit, has committed a breach of the condition of the bond by not prosecuting without delay. In *Axford v. Perrett (a)*, where the plaintiff in

(a) 4 Bing. 586.

replev

1893.

HARRISON
against
WARDLE.

replevin had allowed two years to elapse without taking any proceeding, the Court of Common Pleas intimated that the replevin suit must be considered at an end, by analogy to the practice of the superior courts; but they added, that, at all events, the defendant had not prosecuted his suit without delay.

Cur. adv. vult.

DENMAN C.J. now delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows: — On the argument before us, it was contended that the plaintiffs had shewn no breach of the condition of the bond, because the suit was still continuing, and it was said that there could be no breach unless there was a judgment for the defendants; and an authority was cited to this effect, from *Carthew*, 519. But in that case the question did not arise upon a breach assigned for not prosecuting without delay; and if any effect is to be given to those words, it seems impossible to say, that if the plaintiff in the suit does not use due diligence in its prosecution, the condition is not broken; and the opinion of the Court in the latter part of the judgment in the case of *Axford v. Perrett* (a), is to the same effect.

The question then is, Whether it sufficiently appears upon the pleadings that there has been a delay on the part of *Wardle*? It is said there has been none, because the plaintiffs are estopped by the sheriff's return from saying that they were not summoned; and, if they were summoned, it was their own fault, and not the defendant *Wardle's*, that the action was delayed.

But it is difficult to say that the sheriff would be

(a) 4 Bing. 586.

estopped

estopped by his return in this action, which is not between the same parties as that in which the return was made; and if he is not, the plaintiffs certainly are not concluded by this return.

Admitting, however, that the plaintiffs are not thus concluded, and that, upon the replication to the second plea, it is to be taken that the plaintiffs were not summoned at all, still it appears, in both pleas, that the writ of recordari, which was sued out at the instance of *Wardle*, contained a direction to the sheriff to prefix a day to the parties, which is, in effect, a direction to summon the plaintiffs; and we think that the defendant *Wardle* was not responsible for the default of the sheriff, or guilty of delay in the suit, if the sheriff neglected to serve the summons. On this ground it appears to us that the defendants are entitled to judgment.

Judgment for the defendants.

1893.

—
HARRISON
against
WARDLE.

1833.

The King
against
The CHELSEA
Water Works
Company.

in another, who may or may not have the privilege of using that under-portion: *Rowe v. Brenton* (a). Here, by the royal warrant, that privilege is in the company, and they occupy the substratum by their pipes.

F. Pollock and Bodkin, contra. It would be difficult, after the cases of the *Birmingham and Brighton Gas-Light Companies* (b), to contend, generally, that pipes of this description are not rateable. But here the herbage of the ground under which the pipes are laid is the ranger's, and he is rated for it; and there is no authority for the rating of an underground occupation, where the surface of the soil is in different hands. This view appears to have been taken by *Buller J.* in *Rex v. Joliffe* (c), where he observes, that the appellant had a mere way-leave over the surface, and if he could be assessed for that, the soil would be doubly rated. The rating of pipes under the streets does not affect this question, because no person is rated for the surface of the streets. In the cases cited on the other side, as to occupation by pipes, the parties had an absolute interest in the soil, or at least no one else had a rateable interest. The dictum of *Parke J.*, which has been cited, is, that no person is an occupier, unless he has the *exclusive* right to some portion of the soil. It cannot be said that if the owner of a field, or a house, gives permission for pipes to be passed under part of his property, there is a rateable occupation by means of such pipes. As to the reservoir, it was not made by the company; they had only the King's permission to avail themselves of it, as if the crown had permitted

(a) 8 B. & C. 766.

(b) 1 B. & C. 506. and 5 B. & C. 566.

(c) 2 T. R. 94.

them to make use of the *Serpentine River*, or *Virginia Water*, for a like purpose. There is no exclusive occupation. The recital of the warrant of Geo. I., which states the petition of the Company, shews that they did not even ask for an exclusive occupation: they only prayed the liberty *to use and enjoy* the reservoir and pond; that petition only was referred to the Commissioners of the Treasury; and the recommendation of the Surveyor-General, and the grant of the crown thereupon made, are not to be extended in construction beyond what the parties asked. The crown only gives *the use* of a reservoir and pond. The case may be different, in this point of view, as to the pipes, because the Company do ask permission to "lay their mains," which may imply an exclusive occupation; but with respect to the reservoir, there is no such occupation asked or given: they use it in common with the crown. The Board of Works might at any time exercise a control over it. Substantially, the Company have no greater interest in this basin, than the *Mersey and Irwell* Navigation Company had in the water under their jurisdiction in the case cited on the other side (a). It is nothing more than the case of proprietors obtaining leave to pass a body of water through lands of the crown, on condition of keeping it in an ornamental state.

1833.

—
The King
against
The CHELSEA
Water Works
Company.

DENMAN C. J. I think it is quite clear the pipes in the park are rateable. The ranger is rated for the *herbage* only. It is evident, therefore, that the soil beneath may be rated in the hands of other persons, who have the exclusive use and possession of that. As to the reservoir, the Court will take time to look into the grant, and consider its effect.

(a) 9 B. C. 95.

M 4

LITTLE-

1833.

**The Kings
against
The Chelsea
Water Works
Company.**

LITLEDALE J. As to the pipes in the park, I entertain no doubt. The circumstance of the herbage being rated in the hands of the ranger, affords no ground for exempting them.

PARKE J. I am of the same opinion. Nothing is rated in the ranger's hands but the herbage.

As to the other part of the case,

Cur. adv. vult.

In the present term, the judgment of the Court was delivered by

DENMAN C. J., who, after stating the case, proceeded as follows:—With respect to the pipes laid in the park, it was admitted by the learned counsel for the appellants, that, unless he could distinguish this case from those in which it was decided that pipes of similar companies laid in the streets were rateable, the rate in the present instance, in that respect, must be confirmed. The ground of distinction was, that here another person was rated for the surface of the land under which the pipes were placed. But we are clearly of opinion that this makes no difference. That part of the soil which the Company occupied was not included in that rate. Upon this question the Court expressed a clear opinion in the course of the argument.

The only reason for deferring our judgment was, that we might have an opportunity of more attentively considering the effect of the royal warrant, under which the reservoirs were made. We have done so; and we are of opinion that it gave to the Company as much interest in the space where their reservoirs are made, as in that where the pipes are laid. It is impossible

to

to distinguish one from the other. Their interest, indeed, in the former is expressly, in the latter by implication, at will only; but a tenant at will is, until the will be determined, an occupier of the land; and as the Company are, on the authority of the decided cases, the occupiers of the land filled by the pipes, they must be considered as the occupiers of that where the reservoirs are constructed. They appear to us to have the exclusive right in a portion of the soil in both cases, though for a limited purpose only.

1833.

—
The KING
against
The CHRELA
Water Works
Company.

Rate confirmed, for the amount stated in the case.

The KING *against* The Inhabitants of ST. JOHN
BEDWARDINE.

Saturday,
June 1st.

ON appeal against an order of two justices, whereby *Robert Shirton* was removed from the parish of *Saint John Bedwardine* to the parish of *Hanbury*, both in the county of *Worcester*, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper, *R. Shirton*, had, before he was twenty-one years of age, gained a settlement in *Hanbury*, by a hiring and service for a year with one *John Stain*. After he came of age, and before he was twenty-four, being lame, he applied for relief to the overseers of *Hanbury*, who recommended him to learn some trade, but refused to bind him out; nevertheless, they pro-

A person of the age of twenty-one years, is not a poor child whom the parish officers are to bind out apprentice with the assent of two justices, within the meaning of the 56 G. 3. c. 139.

Section 11. of that statute extends only to indentures of apprenticeship of poor children; and, therefore, an indenture whereby a per-

son of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two justices.

mised

1833.

—
The King
against
The Inhabit-
ants of
St. JOHN
BEDWARDINE.

misad that, if he could find a master, they would give him 4*l*. The pauper then put himself apprentice to one *Hatch*, living in *St. John Bedwardine*. The parish officers of *Hanbury* gave the money to the pauper, who paid it to *Hatch*. The indenture was by deed, sealed by the master and the apprentice, but was not approved of by two justices. Whilst under this indenture, the pauper slept more than forty nights in *St. John Bedwardine*, and would be settled there, if the indenture were good in law.

Legh, in support of the order of sessions. The pauper being above the age of twenty-one years when bound, was not a "poor child" within the meaning of those words in 56 *Geo. 3. c. 139. s. 11*. The 5 *Eliz. c. 4. s. 26*. enacted, that every householder dwelling and exercising an art or mystery in any town corporate might have and retain the son of any freeman to serve and be bound as an apprentice for seven years at the least, so as the term of such apprentice should not expire before such apprentice should be of the age of twenty-four years: and sect. 36. provided, "that no person should, by force or colour of that statute, be bound to enter into any apprenticeship, other than such as were under the age of twenty-one years." (a) The 18 *G. 3. c. 47.*, after reciting the 43 *Eliz. c. 2. s. 5.*, which authorised parish officers, by the assent of two justices, to bind children of parents *who were not able to keep and maintain them*, to be apprentices till such man-child should come to the age of twenty-four years, enacts, that any man-child bound apprentice under the said act, shall be bound "for no longer term than till such

(a) See 54 *G. 3. c. 96*.

child shall come to the age of twenty-one years." The stat. 56 G. 3. c. 139. (as appears by the preamble) was passed to remedy the grievances which had arisen from the binding of *poor children* apprentices, by parish officers, to improper persons, and to persons residing at a distance from the parishes to which such poor children belonged, whereby the parish officers and the parents of *such* children were deprived of the opportunity of knowing the manner in which *such* children were treated, and enacts, (sect. 1.) that before any child shall be bound apprentice by the parish officers, such child shall be carried before two justices, and they are to inquire into the propriety of binding such child apprentice to the proposed master, and also whether he reside, or have his place of business, within a reasonable distance from the place to which such child belongs; and if the father or mother of such child be living, and reside in or near the place to which such child shall belong, such justices are (if they think fit) to examine such father or mother; and if they, the justices, think it proper, they are to make an order for the binding. The justices, therefore, are, in fact, invested with the character, and are to perform the duties, of parents, in selecting a proper master. A person, however, who has attained the age of twenty-one does not require their protection, but is capable of judging for himself as to the fitness of the master to whom he is to be bound: he does not come within either the spirit of the act, or the meaning of the word *child*. It will be said, however, that, assuming the pauper not to have been a *poor child* within the meaning of the act, and admitting that the first ten sections apply to poor children only, still section 11. applies to all indentures whatever, whereby parties, whether children or not, may
be

1833.

The KING
against
The Inhabit-
ants of
St. JOHN
BROWARDEN.

1833.

The KING
against
The Inhabit-
ants of
St. JOHN
BEDWARDINE.

be bound. That section, after reciting, that the salutary provisions of the 43 *Eliz.* are frequently evaded in binding out *poor children*, enacts, "that no indenture of apprenticeship by reason of which any expense whatever shall be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices, according to the provisions of the said act and of this act." The enacting words here must be restrained to such indentures as were within the general mischief intended to be prevented;—that was, the improper binding out of poor children. Besides, here no payment was made by the parish officers for binding the pauper. The putting out was not occasioned by them: they gave him relief, and he applied it in learning a trade. And *Rex v. St. Peter's Hereford* (a) shews that s. 11. must be construed with some restrictions.

Godson contra. The pauper, at the time of the binding, was within the meaning of the term "poor child" in 56 G. 3. c. 139. The statute 43 *Eliz. c. 2.* contemplated that a party might continue a poor child till the age of twenty-four years. [*Parke J.* That the apprenticeship might continue till then, but not that a party up to that age might be bound by the parish officers.] A person who continues part of his father's family after twenty-one is not emancipated; *Rex v. Sowerby* (b). [*Denman C. J.* In that sense a party might continue a child all his life.] Then, secondly, the 56 G. 3. c. 139. s. 11. avoids every indenture of apprenticeship, if any part of the consideration for it, or the expense relating to it, is paid out of the parish funds, unless it receive the assent of two justices. *Rex v. St. Paul's Exeter* (c) shews

(a) 1 B. & Ad. 916.

(b) 2 East, 276.

(c) 10 B. & C. 12.

that

that the first ten sections apply to cases where the parish officers are parties to the indenture, and the eleventh to cases where the parish officers do not join in the indenture, but where some part of the expense is paid out of the public parochial funds. The object in that section is to protect parishes against a wanton or clandestine expenditure of their funds. It is perfectly consistent with the language used by the legislature, that the first ten sections may apply to the binding out of poor children, and the eleventh to all indentures whatever.

1833.

The King
against
The Inhabit-
ants of
St. John
BREDWARDINE.

DENMAN C. J. It is impossible to say that a person who has attained the full age of twenty-one years, is a poor child within the meaning of this statute. Although a person might have been compelled to serve as an apprentice till the age of twenty-four, it does not follow that he might be bound by indenture after twenty-one. It is however said, that the enacting words of the eleventh section are not confined to indentures of apprenticeship of poor children, but extend to all indentures. The words, "no indenture," are undoubtedly very large, but they must be construed with reference to the recital, and to the concluding words of the clause. The recital refers to the binding out of *poor* children; and the enactment is, that "no indenture by reason of which any expense whatever shall be incurred by the public parochial funds shall be valid, unless approved of by two justices according to the provisions of the said act and of this act." Now, the provisions of the recited act, as to the binding out of apprentices, apply to children whose parents shall not be thought, by the parish officers, able to keep and maintain them; and the provisions of 56 G. 3. c. 139., in the first ten sections, apply to the binding out of poor children.

1853.

—
The King
against
The Inhabit-
ants of
St. JOHN
BREDWARDINE.

children. *Rex v. St. Paul's, Exeter (a)*, does not shew that the first ten sections contemplate children, and the eleventh those who are not children.

LITLEDALE J. I think the first ten sections of the 56 G. 3. c. 139. apply to children under the age of twenty-one years. The first section directs the justices to enquire into the propriety of binding the *child* apprentice, and whether the intended master has his place of business within a reasonable distance from the place to which such *child* shall belong, and if the father or mother of the *child* be living, they are to examine them. There, the word *child* is used in its ordinary sense. Then it is said that sect. 11. has no limitation, but applies to all indentures whatever, of children or others. I should have doubted as to this point, because it seems reasonable that the check there imposed should be provided for in all cases; but the words in the latter part of the clause are, "according to the provisions of the said act and of this act;" and those provisions apply to the binding out of children only. It follows that sect. 11. can apply only to indentures whereby children are bound.

PARKE J. I am clearly of opinion, that a person above the age of twenty-one years is not a poor child within the meaning of this statute. My only doubt has been, whether sect. 11. applies to indentures of all persons whether children or not. The concluding words of that section, satisfy me that it is confined to indentures of apprenticeship of poor children only. The words of the enacting part of a clause may be larger than the recital, and where they are, they will compre-

(a) 10 B. & C. 12.

head any case within the general mischief intended to be prevented. But here, that was the improper binding out of poor children by parish officers. The first ten sections apply to such children only. Then sect. 11. recites, that the salutary provisions of the 43 *Eliz.* are frequently evaded in the binding out of poor children, and the premium, or part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out poor children without the sanction of justices. The mischief recited in that section, therefore, is not so much the misapplication of the parish funds, as the binding out of poor children without the sanction of justices. Then the *enactment* is, "that no indenture of apprenticeship, by reason of which any expense shall be incurred by the public parochial funds shall be valid, unless approved of by two justices *according to the provisions of the said act and of this act.*" Now, the provisions of the 43 *Eliz. c. 2.* on this head, and those of the first ten sections of 56 *G. 3. c. 139.*, apply to indentures whereby a child or children are bound out. The latter words, therefore, of the enacting clause, controul the former, and confine them to indentures of apprenticeship whereby poor children are bound.

PATTESON J. Looking at the terms of s. 11., I have not the least doubt that it is confined to indentures of poor children. The enactment is, that no indenture, by reason of which any expense whatever shall be incurred by the public parochial funds, shall be valid, unless approved of by two justices, *according to the provisions of the said act and of this act.* Now, those provisions authorised justices to approve of indentures only whereby poor children were bound out by the parish officers.

1833.

The King
against
The Inhabit-
ants of
St. JOHN
BROWARME.

1855.

The King
against
The Inhabit-
ants of
St. JOHN
BEDFORDING.

officers. The enactment, therefore, which avoids the indentures unless approved of by two justices, being construed with reference to those provisions, can apply only to the binding of poor children.

Order of sessions confirmed.

Saturday,
June 1st.

The KING *against* The Inhabitants of BANBURY.

(BANBURY *against* WITNEY.)

Pauper was bound apprentice for seven years to a breeches-maker, and served his master half a year; the latter then failed in business, and told the pauper he might go and work for one B., who lived in another parish, and if pauper did not become troublesome to him, the first master, or to his parish, till the end of his time, he would give pauper his watch. The pauper agreed with B., and worked for him

ON appeal against an order of two justices, whereby *Richard Carpenter* and his three children were removed from the parish of *Banbury* to the parish of *Witney*, both in the county of *Oxford*, the sessions discharged the order, subject to the opinion of this Court on the following case:—

By indenture of apprenticeship, dated the 10th of *Sept.* 1801, the pauper, *R. Carpenter*, was bound apprentice by the trustees of a charity in *Charlbury*, to *J. Hobbs* of *Witney*, tailor and breeches-maker, to serve for seven years. The master's covenants were, to teach the trades, and to find the apprentice sufficient meat, drink, washing, lodging, clothing, and all other necessaries, during the term. The pauper entered into his service on the 6th *Sept.* 1801, at which time he was about twenty years of age, and served his master

at breeches making, by the piece, at the usual rate. B. frequently carried messages between the first master and the pauper. The latter having worked for B. a year, in B.'s parish, agreed (with the consent of his first master) to work by the piece for C., another breeches-maker, living in a third parish, who gave better terms. While he so worked with C. his first master came to see him, and again promised him his watch at the end of his time. The pauper worked two years for C., living in C.'s parish; he afterwards left, and his first master then sent him his watch. The pauper kept his earnings and maintained himself:

Held, by *Denman C. J.*, *Littledale J.*, and *Patteson J.*, (*Parke J.* dissentiente) that the inhabitation of the pauper in the parishes of the second and third master was connected with the apprenticeship, and that he thereby gained settlements in those parishes.

in.

in *Witney* about half a year. *Hobbs*, the master, then failed in business, but did not become bankrupt; and, having little or no work for the pauper to do, said,—“*Richard*, it is of no use your stopping here; I have nothing for you to do; you had better go, if you can get a place; *Barry* of *Bloxham* wants hands, and he is a *Witney* man,—you may go and work for him, if you like; and if you do not become troublesome to me or *Witney* parish till the end of your time, you shall have my watch,” which he then shewed him. The pauper went to *Barry* at *Bloxham* (which is about twenty miles from *Witney*); he paid his own conveyance. The pauper agreed with *Barry* to work for him, and to receive 2s. 6d. a pair for making breeches, which was the regular price. *Barry* used often to go to *Witney*, and several times carried friendly messages between the pauper and *Hobbs*. The pauper worked for *Barry*, in *Bloxham* parish, a year, maintaining himself by the wages he received; he then heard that one *Baker*, of *Banbury*, wanted hands, and that he gave better wages than *Barry*; he therefore sent by letter to *Hobbs* for his leave to work for *Baker*, and received a verbal assent from *Hobbs*, and a promise to come and see him. The pauper went to *Baker*, and agreed to work for him to make breeches at 2s. 9d. a pair. After the pauper had been with *Baker* about three months, *Hobbs* came to *Banbury* to buy leather of *Baker*, and told the pauper he was glad to see him doing so well for himself, and going on so comfortably; he gave the pauper 1s., and again promised him the watch when his time was out. He afterwards came again to buy leather, and again saw the pauper at *Baker*’s at work, and repeated his promise of the watch. The pauper worked for *Baker* two years, living the whole time in *Banbury*, and

1833.

—
The King
against
The Inhabit-
ants of
Banbury.

1833.

The King
against
The Inhabit-
ants of
BANBURY.

then left. *Hobbs* then sent the pauper his watch; the same he promised, and shewed him, when he left his house at *Witney*. The pauper maintained himself by the wages he received from *Barry* and *Baker*, and *Hobbs* had nothing to do with his earnings. The question for the opinion of the Court was, whether the residence in *Bloxham* or *Banbury* was a residence under the indenture, sufficient to confer a settlement in either of those places.

Walesby in support of the order of sessions. The pauper gained a settlement in *Banbury*. There was a consent of the master to the particular service in each of the places, and therefore the residence in each was under the indenture, *Rex v. Shebbear* (a). *Rex v. The Holy Trinity, Minories* (b), is expressly in point. There, the master, after giving his apprentice leave to get another master, recommended him to go to a particular person in the same business, and make an agreement with him for his own good, which he accordingly did, and served his second master two months before the indentures were given up to him by his first master: and it was held that by such service with the second master he gained a settlement in his parish. Independently of that, the pauper's absence was in this case a benefit to the master; and it has been held, even in a case of general consent, that if the apprentice works for the benefit of the master, it is a service with him: *Rex v. Offerton* (c). Besides, in this case, the master, in the first instance, exercised his controul for the good of the apprentice. *Rex v. Whitchurch* (d) may be relied on by the other side. But there, the first master did

(a) 1 East, 73.

(b) 3 T. R. 605.

(c) Burr. S. C. 802.

(d) 1 B. & C. 574.

not know whom the apprentice was going to serve, nor did the second know that the pauper was an apprentice. In *Rex v. Ashby de la Zouch* (a), the service with the second master was under a contract of hiring, and not under the indenture of apprenticeship.

1833.

—
The King
against
The Inhabit-
ants of
Barnard.

Chilton contra. To establish a settlement in the parish of the second master, the service with him must be under the indenture; and there must be an express consent of the first master to the particular service, and a knowledge by the second that the relation of master and apprentice subsisted between the first master and the pauper. Here that is not found. That mere knowledge and acquiescence on the first master's part, without express consent, is not sufficient, appears from *Rex v. Crediton* (b), and *Rex v. St. Helen's, Stonegate* (c). In *Rex v. Whitchurch* (d), the apprentice asked his mistress's leave to go into another service, to which she consented, saying she was not against it, if he could better himself; he did not mention where he was going; he hired himself to one *Jenkinson* for a year, returned, and told his mistress, who said, "very well, she was not against it." In a few days he went to his new place, and in about a fortnight returned to his old mistress for his clothes; she said, "she hoped he liked his new place;" and he said, "he did:" it was held that that was not a service with *Jenkinson* under the indenture, but a service under a contract of yearly hiring; because it did not appear that *Jenkinson* knew that the pauper was an apprentice, and it was not expressly stated that there was any consent of the mistress to the particular service, or that the name of *Jenkinson* was mentioned to her,

(a) 1 B. & A. 116.

(b) 1 East, 59.

(c) 1 East, 285.

(d) 1 B. & C. 574.

1833.

The King
against
The Inhabit-
ants of
Banbury.

either when the apprentice went away the first time, or when he returned and told her he had hired himself. [*Patteson J.* How is the present case distinguishable from *Rex v. The Holy Trinity, Minorities (a)*? In that case there was nothing to shew that *Edwards*, the second master, knew that the pauper was an apprentice.] That case was determined before the rule had been distinctly laid down that the service with the second master must be referable to the indenture, and it is virtually overruled by *Rex v. Whitchurch (b)*. In *Rex v. Ship-ton (c)* the master of a parish apprentice, not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, and *agreed* with her to work there for a twelvemonth for his meat and drink. He worked for her four years and four months, having made a new agreement at the end of the second year for wages; and it was held that no settlement was gained by service with the sister, inas-much as such service was not under the indenture, but under a contract of yearly hiring. The inhabitation of the pauper in *Bloxham* and *Banbury* was under a con-tract of hiring, and not of apprenticeship; and accord-ing to the construction put upon the statute in *Rex v. Ilkeston (d)* and *Rex v. Linkinhorne (e)*, the inhabitation in those parishes ought to have been in the character of an apprentice, and in some way or other in further-ance or pursuance of the objects of the apprenticeship. Any thing which indicates an intention that the service with the second master should not continue under the original indenture, will prevent the gaining of a settle-

(a) 3 T. R. 605.

(b) 1 B. & C. 574.

(c) 8 B. & C. 88.

(d) 4 B. & C. 64.

(e) 3 B. & Ad. 413.

ment in the parish where it is performed. In *Rex v. Ecclesfield* (a) a new indenture was entered into with the second master, and this, though not capable of taking effect so as to constitute an apprenticeship, yet, as it served to indicate an intention that the service should not continue under the original indenture, but begin de novo, was held to prevent the gaining of a settlement in the place where the service with the second master was performed.

1833.

The King
against
The Inhabit-
ants of
BANBURY.

DENMAN C. J. I am of opinion that a settlement was gained in *Banbury*. I am unwilling to introduce into the construction of an act of parliament terms or definitions which are not to be found in it. The stat. 3 *W. & M. c. 11. s. 8.* enacts, "that if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement." There must, therefore, be a binding, as well as an inhabitation in a parish to give a settlement. But the authorities shew, that where a party has been bound apprentice in one parish and expressly permitted by his first master to work for another in a different parish, the service to the second master is, constructively, a service under the indenture, and that the original binding continues in force during the whole period of such service. That being so, the facts of this case shew that the binding continued in force during the whole time of the pauper's service with the second and third master. It appears that the first master having failed in business, and having no work for the pauper to do, told him to get a place, and said that one *Barry of Bloxham*, a breeches-maker, wanted hands, and that the pauper might

(a) 6 *M. & S.* 173.

1833.

—
The King
against
The Inhabit-
ants of
BANBURY.

go and work for him if he liked. The pauper accordingly agreed to work for *Barry*, and was to be paid by the piece. *Barry* carried messages to and from the first master and the pauper, and therefore must be taken to have known that the relation of master and apprentice subsisted between them. The pauper (having first applied for and obtained the consent of his first master), went afterwards to work in *Banbury* with one *Baker*, another breeches-maker; so that, during the whole time, he worked at his original trade; and both he and his first master considered the apprenticeship as continuing; for the pauper applied for leave to work for *Baker*, and the first master, on that occasion, promised, as he had done before, to give him his watch at the end of his time, and he afterwards gave it to him. I agree that the binding must not only continue during the *whole* of the service, but that the *inhabitation* of the pauper, to give him a settlement, must, in some way or other, be connected with the apprenticeship. But as the pauper here not only continued to work at his original trade, but he and *Hobbs* both considered the relation of master and apprentice to continue between them, I think the inhabitation in *Bloxham* and *Banbury* was referable to the binding, and one of the consequences of the apprenticeship. *Hobbs* and the pauper may have thought that the best way for the latter to learn the trade was by serving other persons in the same business. The third master, as well as the second, must be taken to have known that the relation of master and apprentice subsisted between *Hobbs* and the pauper, and he and the pauper considered the indenture still in force. I think, therefore, there was in this case a sufficient binding and inhabitation in the parish of *Banbury* within the statute and the decided cases, to confer a settlement.

LITTLE-

LITLEDALE J. I am entirely of the same opinion. The indenture was not cancelled, nor intended so to be. The master gave an express assent to the apprentice's working with *Barry*, and promised to give him his watch; he afterwards, on the application of the apprentice, assented to his working with *Baker*; and when he had been in the service of the latter some time, again promised him the watch. By the deed, the master was bound to provide the apprentice with board and lodging, but the apprentice went to a place where these were found for him, worked at the same occupation, and was paid by the piece. I think it sufficiently appears that he continued to work under the indentures; indeed, I hardly know how that could appear more strongly, unless there had been an *actual assignment* of the indenture. I consider the indentures to have continued in force during the whole term of the apprenticeship. The next question is, did the pauper serve the second and third master as an apprentice? The leave given by *Hobbs* must be taken to be for the pauper to work for *Barry* and *Baker* as he did for him, *Hobbs*, viz. as an apprentice. It is not found expressly that *Barry* or *Baker* knew the pauper was an apprentice to *Hobbs*; and if that fact be necessary, it appears to me not sufficiently proved; but I do not see why it should be requisite that the second master should have that knowledge. In some of the cases on this subject there was want of notice to the second master, and in others not; and in some of them there are expressions which tend to shew that such knowledge is necessary. I think, however, that it is not so, and that the assent of the first master is sufficient. The pauper, then, in this case, must be considered to have served the second and third master under a contract of apprenticeship, and not of hiring.

1833.

The KING
against
The Inhabit-
ants of
BANBURY.

1893.

The King
against
The Inhabit-
ants of
Banbury.

PARKE J. I am of opinion that no settlement was gained in *Banbury*. In order to gain a settlement by apprenticeship, the statute 3 *W. & M. c.* 11. s. 8. requires a binding and inhabitation; and according to the construction put upon that provision in *Rex v. Ilkeston* (a) and *Rex v. Linkinhorne* (b), the inhabitation must be in the character of an apprentice, and in furtherance or in pursuance of the object of the apprenticeship. The statute does not, in terms, require a service in the parish; it is sufficient if there be an inhabitation which is, in some way or other, connected with the apprenticeship. The question, then, is, whether the pauper, during the time he worked for *Barry* or *Baker*, worked for them in the character of an apprentice. It seems to me that he did not, but that he was employed as a servant. If the first master had assigned over the apprentice to the second, and thereby obliged the apprentice to serve in that character, the service then would be clearly referable to a contract of apprenticeship; or, if the first master had communicated to the second that the pauper was his apprentice, and the second master had received him in that character, the inhabitation would have been connected with the apprenticeship. But there is no authority to shew, that if the apprentice, having leave from his original master to work for another, goes and hires himself to and works for that other as a journeyman, such service is, in any way, connected with the indenture. In *Rex v. The Holy Trinity, Minories* (c), the pauper lived with the second master in the character of apprentice; for, by the very terms of the agreement between them, he was to instruct the pauper in his business. The modern autho-

(a) 4 *B. & C.* 64.(b) 3 *B. & Ad.* 413.(c) 3 *T. R.* 605.

rities are very strong on this subject. In *Rex v. Ashby de la Zouch* (a), the master of several apprentices, upon quitting business, proposed to assign all his apprentices, without mentioning either their names or number, to one *Peele*, but no assignment was ever made; the pauper, one of the apprentices, was afterwards hired by *Peele* as a servant for fifty-one weeks; and her former master, on meeting her, expressed his approbation of her having gone into *Peele's* service. The sessions having found that there was no particular assent of the original master to the second service, and therefore that the relation of master and apprentice never subsisted between *Peele* and the pauper, the Court thought them well warranted in that conclusion; and *Bayley J.* observed, that the master to whom the pauper went to be hired was never apprised of the relation of master and apprentice having subsisted; he hired her as a servant, which constituted a new and different relation. So in *Rex v. Whitchurch* (b), it is said by the Court, "In this case it is impossible to say that the pauper served *Jenkinson* (the second master) as an apprentice, under the indenture; it does not appear that *Jenkinson* even knew that the pauper was an apprentice." In *Rex v. Shipton* (c), where the master, not having sufficient work for his apprentice, proposed to him to go to a farm in a different parish, occupied by the master's sister, and the pauper agreed with her to work there for a twelvemonth for his meat and drink, and worked for her for four years and four months, receiving from her, during the first two years, meat and drink, and during the third and fourth, wages: Lord *Tenterden* said, "it

1839.

—
The King
against
The Inhabit-
ants of
Barnack.

(a) 1 B. & A. 116.

(b) 1 B. & C. 574.

(c) 8 B. & C. 88.

appeared

1893.

The King
against
The Inhabit-
ants of
BANBURY.

appeared from the facts stated, that the pauper hired himself to Mrs. *Corser*, the master's sister; the service, therefore, was not under the indenture, but under a contract of hiring." The authorities shew that an apprentice, who, with the assent of his first master, serves a second, must, in order to gain a settlement in the place where he serves the second master, be inhabiting there in the character of an apprentice, and not in that of a hired servant. Now, here, the pauper did not live with *Barry* and *Baker* in that character, because, non constat that they ever knew he was an apprentice. If they had been privy to the relation of master and apprentice having subsisted between *Hobbs* and the pauper, they might be taken to have contracted the same relation, and to have received him into their service as an apprentice, and his inhabitation in their parishes would be considered as having been in that character; but, in this case it seems to me that there was no obligation on the part of the second or third master to teach the pauper, or, on the part of the pauper, to perform the duties of an apprentice to either of them. Upon the whole, therefore, I have come to the conclusion, that there was no sufficient inhabitation in *Bloxham* or *Banbury* to give the pauper a settlement in either of those places.

PATTESON J. The cases on this subject are exceedingly difficult to reconcile with each other. On the whole, I think a settlement was gained in *Banbury*. I agree in the rule laid down by Lord *Tenterden* in *Rex v. Ilkeston* (a), that the inhabitation must be in the

(a) 4 B. & C. 64.

character of apprentice, and in some way or other in furtherance of the object of the apprenticeship. The pauper, in this case, was bound apprentice to *Hobbs*, a tailor, who failed in his business and could not maintain him. The apprentice therefore went to *Barry*, and bound himself to work, not as servant, but as a journeyman by the piece; and while there, hearing he might do better for himself, applied again to his first master, and the latter consented to his working with *Baker*; and on that occasion, for the second time, promised to give his watch to the apprentice *at the end of his time*. Both master and apprentice therefore considered the contract of apprenticeship as still subsisting. The pauper did not bind himself to the third master for any specific time, but agreed to work by the piece. I think an action of covenant might have been maintained by either party (*Hobbs* or the pauper) against the other. In *Rez v. Whitchurch* (a) there was no assent on the part of the first mistress to the particular service. In the first instance, she did not know to whom the apprentice was going; and when he had hired himself, and returned and told his mistress of his having so done, he did not mention the name of the second master. In these cases small circumstances are laid hold of in each particular instance; but I should say, in general, that whenever the original contract continues, and the apprentice, with the consent of the first master, works at a trade with a view to be taught that trade, he must be considered as living with the person under whom he so works, in the character of an apprentice.

Order of sessions confirmed.

(a) 1 B. & C. 574.

1833.

—
The King
against
The Inhabit-
ants of
Barnbury.

1833.

Saturday,
June 1st.

The KING against The Inhabitants of GREAT GLENN.

A. rented a house in the appellant parish of *L.* as tenant from year to year, and died. His widow, a fortnight after his death, told the landlord that she wished to pay the rent weekly; he assented, and she paid it weekly for the following nine months, when she quitted on a week's notice. Two months after her husband's death, the attorney for the respondent parish (which had relieved the widow) told her she had a right to take out administration if she chose, and if she would leave it to him, he would do whatever was necessary; she assented. The letters of administration were obtained, and the pauper resided forty days afterwards in the appellant parish. The sessions found that the administration was fraudulently taken out by the direction and at the expense of the respondent parish, for the purpose of settling the pauper in the appellant parish:

UPON appeal against an order of two justices, whereby *Mary Stevens* and her three children were removed from the parish or township of *Great Glenn* to the parish or township of *Leir*, both in the county of *Leicester*, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper *Stevens* was married to *John Stevens* in *April 1827*; and on their marriage she and her husband went to live in a house in the appellant parish, which her husband had taken of *Thomas Eaglefield* as tenant from year to year, at the rent of *3*l.** per annum, which was a rack-rent. They continued to live in this house until the 14th of *May 1831*, when the husband died. The widow (the pauper) continued the possession from thence for about a fortnight or three weeks. She then went to the respondent parish for a few days, viz. from *Monday* till *Saturday*, when she returned to *Leir*, having left her sister in possession of the house during her absence. She was relieved there by the respondents until the 3d of *December* following. On the next 2d of *June* after her husband's death, the pauper had an

Held, that as the widow was not only entitled, but bound by law, to take out administration, there was no fraud in the transaction which could prevent her from taking, as administratrix, her husband's interest as yearly tenant, and thereby acquiring a settlement. But the Court referred it back to the sessions as a question of fact, whether the widow, after administration granted, continued a weekly tenant, or became a tenant from year to year, in her husband's right.

interview

interview with the landlord, and told him she wished to pay the rent weekly; he assented, and it was agreed that the pauper should pay 1s. 2d. per week, which she paid accordingly until the 5th of *March*, when she quitted in consequence of having received a week's notice to quit.

Some time in *August* after her husband's death, the pauper took out letters of administration to the effects of her husband, under the following circumstances. The attorney for the respondent parish, accompanied by a clergyman, in that month called upon the pauper, and administered the oath, saying, "We shall be obliged to get you to take out letters of administration: I dare say you don't understand it. You have a right to take out letters of administration, if you like; and if you will leave it to me, I will do whatever is necessary." This explanation was not understood by the pauper. However, she said she had no objection, but hoped they would not take her goods, which she believed the respondent parish were going to lay claim to. The pauper was ignorant of administering, any further than she understood her oath was to declare that what she had was not worth 20*l.*; and she never heard, until the 6th of *December* following, that letters of administration had been taken out; when the attorney for the respondent parish, having laid some papers on a table before her, said, "Those are your letters of administration." The pauper's goods, at the decease of her husband, were not worth more than 5*l.*; 3*l.* of which were due for rent, and 2*l.* for other debts. The letters of administration were taken out by the direction, and at the expense, of the respondent parish, for the purpose of settling the pauper in the appellant parish. The pauper resided forty days and upwards in the house
late

1833.

The KING
against
The Inhabit-
ants of
GREAT GLENN

1833.

**The King
against
The Inhabit-
ants of
GREAT GLENK.**

late her husband's, in the appellant parish, after the grant of the above-mentioned letters of administration; whereupon the order of removal appealed against was obtained. The court of quarter sessions found that there was fraud in taking out the letters of administration, and discharged the order.

Humfrey and Burnaby in support of the order of sessions. The pauper did not gain any settlement by residing after her husband's death in the parish of *Leir*, where the house was situate of which he had been tenant from year to year. His interest in that house did not vest in her before the letters of administration were granted, and the sessions have found that they were taken out fraudulently, and for the purpose of settling the pauper in *Leir*. No settlement can be legal which is brought about by practice or compulsion. Resolution of the Judges, 1633, *Dalton*, c. 40., 1 *Nolan*, P. L. 290. The only exception to that rule is the case of settlement by marriage: *Rezv. Birmingham* (a). Assuming that the letters of administration were valid, the wife was not irremovable for forty days. Her husband's interest as tenant from year to year, vested in her as soon as the administration was granted; but nineteen days after his death, it was agreed between her and the landlord, that she should pay 1s. 2d. per week. She then became a weekly tenant in her own right. She paid the rent weekly from that time, and afterwards quitted on a week's notice. She therefore continued a weekly tenant till her term was put an end to. The grant of letters of administration may have the effect of vesting leasehold

(a) 8 B. & C. 29.

property by relation, so as to enable the administratrix to bring actions in all matters relating to that property subsequent to the death of the intestate, but it cannot operate by relation for a purpose perfectly collateral, and so as to put her in the situation of a person irremovable at a time past: *Rex v. Horsley* (a). *Doe v. Porter* (b), shews that the letters of administration vest in the administrator the same interest as the intestate had; but here the agreement on the part of the tenant to hold from week to week, and on the part of the landlord to accept her as weekly tenant, and the payment of the rent weekly by her, amounted to a surrender by operation of law of the old yearly term. The sessions have found fraud: it was a question for them, and they have decided it rightly: *Rex v. Tillingham* (c).

Amos and *Hildyard* contra. The sessions have stated the premises, from which they concluded that the letters of administration were fraudulently obtained, and the premises do not establish that species of fraud which will render the administration void, and prevent the pauper from gaining a settlement. To avoid a settlement on the ground of fraud, there must be an attempt to make a thing appear to be done, which is not done; as where there is a hiring for eleven months, and to give one month over. That was held to be substantially a hiring for a twelvemonth, *Rex v. Milwich* (d). In *Rex v. Mursley* (e), the pauper was hired three days after *Michaelmas* until *Michaelmas* following, and the sessions stated that such transactions

1833.

The KING
against
The Inhabit-
ants of
GREAT GLENN.

(a) 8 East, 405.

(b) 3 T. R. 13.

(c) 1 B. & Ad. 180.

(d) Burr. S. C. 433.

(e) 1 T. R. 694.

1833.

—
The King
against
The Inhabit-
ants of
GREAT GREEN.

on the part of masters were fraudulent; but *Buller J.* said, "fraud only arises where there is, in truth, a hiring for a year, and the parties endeavour to colour it, in order to prevent a settlement. In *Rex v. Tillingham (a)*, the question was, whether the pauper gained a settlement by renting a tenement under the 6 G. 4. c. 57., which required that the rent to the amount of 10*l.* should be actually paid for the term of one whole year at the least. There was no payment of rent at all by the pauper; but he applied to the parish officers of *Tillingham* for relief, and they gave him a sum of money, which enabled him to pay a year's rent for a tenement which he had occupied in *Bradwell*, another parish; and the Court held it to be a question for the sessions, whether that payment was fraudulent or not: adding that if the sessions should be of opinion that the money was given merely to enable the pauper to gain a settlement in *Bradwell*, they ought to find fraud. There, if the money was paid with such a view by the parish officers, there was no payment of rent at all by the pauper; it was a colourable payment, instead of a real one. In *Rex v. Birmingham (b)*, there was a settlement by marriage in the appellant parish; and it was held that the marriage of a female pauper, brought about by parish officers, did not prevent her from gaining a settlement in the husband's parish; because there the whole transaction was not colourable: the woman had acquired a new legal capacity, and though the motive for investing her with it was fraudulent, her new capacity was not fictitious. This is a stronger case; here the pauper was not only entitled, but bound by

(a) 1 B. & Ad. 180.

(b) 8 B. & C. 29.

law, to take out letters of administration; for a party who administers, and omits to take out letters of administration within six months after the intestate's death, is subject to a penalty of 50*l.* by the 37 *G. 3. c. 90. s. 10.* Now entering on a term of years is administering. Besides, here there was in fact no fraud practised. There was no misrepresentation or concealment of any fact; the pauper was merely asked to allow administration to be taken out, and she consented. If the parish officers of *Leir* had been informed of her intention to procure administration, they could not have prevented its being carried into effect. Assuming even that there might be ground for avoiding the letters of administration, still so long as they remain unrepealed, they operate to vest the property of the intestate in the administratrix. In *Allen v. Dundas (a)*, payment to an executor under a probate of a forged will, was held not to be invalid, because probate is a judicial act, and conclusive till repealed, and courts of law have no jurisdiction over the subject matter. Suppose the husband had been trustee of a term, and the widow as administratrix had assigned the term, could the assignment be avoided because the motive for investing her with the character of administratrix was to give her a settlement? Here the widow clearly was invested with the character of administratrix, and was entitled to be so invested; and she could not be removed after having obtained letters of administration. Fraud may easily be suggested in such cases: but where a party comes by operation of law to an estate from which he cannot be removed, the legal consequence must follow, and a set-

1833.

—
The King
against
The Inhabit-
ants of
GREAT GLENN.

(a) 3 *T. R.* 125. •

1833.

—
The King
against
The Inhabit-
ants of
GREAT GLEN.

tlement be gained by forty days' residence, *Rex v. Stone* (a), *Rex v. Ynyscynhanarn* (b).

It is said that there was a surrender of the term from year to year by act and operation of law, but the pauper had no power to surrender her interest before she took out letters of administration. In *Middleton's* case (c), it is said that if A. releases an action, and afterwards takes out administration, it shall not bar him, for right of action was not in him at the time of the release; and there is a *Nisi Prius* decision of Lord *Tenterden* in *Williams on Executors*, 240, note s., to the like effect.

DENMAN C. J. . The pauper, as administratrix of a tenant from year to year, though at a less rent than 10*l.*, would gain a settlement by forty days' residence, because, the interest vested in her by act and operation of law. The only question as to this point, is, whether the settlement is altogether void because the sessions have found that there was fraud in taking out the letters of administration. They have stated the facts on which that finding was grounded; and I am of opinion that there was not, in this case, any fraud sufficient to prevent the estate of the intestate from vesting in his widow. She not only had a right, but was bound, to take out letters of administration; and she consented that they should be obtained. There is no ground for saying that they should not have their full legal operation of vesting in her the property of the intestate. Another question is, whether she resided in the parish forty days while the leasehold estate (formerly her husband's) was vested in her. There

(a) 6 T. R. 295.

(b) 7 B. & C. 233.

(c) 5 Rep. 28. b.

are premises from which the sessions might have inferred an agreement by her, after administration granted, to become a weekly instead of a yearly tenant. They have not drawn any such inference; but have left it doubtful whether she resided forty days in the parish of *Leir*, while the leasehold estate, which formerly belonged to the husband, was vested in her. If that be really a matter of doubt, the case must go back to the sessions, in order that they may determine it.

1833.

—
The King
against
The Inhabit-
ants of
GREAT GLENN.

LITLEDALE J. I think that, under the circumstances stated in this case, the leasehold interest of the husband was not prevented from vesting in his widow, on the ground that the letters of administration were fraudulently obtained. She was not only entitled, but bound by law to take them out; and was merely told by the solicitor to the parish of *Leir* that she was so entitled, and assented to administration being obtained. There was no misrepresentation, or suppression of any fact. The only other question is, whether she resided forty days in the parish of *Leir* after her husband's interest as tenant from year to year had vested in her as administratrix. If within that period she held as a weekly tenant, and continued to do so ever afterwards, she was not irremovable. It is stated that, on the 2d of *June*, she told the landlord she wished to pay the rent weekly, and that he assented; but whether she then actually took the premises from week to week, or only gave notice to the landlord that she wished to do so, is not very clear. I should rather think she then became a weekly tenant. It is true she could not surrender her husband's interest before taking out administration, but as the facts are left doubtful, the case must be sent back

1833:

The King
against
The Inhabit-
ants of
GREAT GLENN.

to the sessions, in order that they may say whether, after taking out administration, she was a weekly tenant in her own right, or a tenant from year to year in right of her husband.

PARKE J. I should be satisfied to dispose of this case on the ground that the sessions had found (as I think they would) that the pauper, before the letters of administration were taken out, had become a weekly tenant in her own right, and continued so afterwards, and consequently that she did not reside forty days in *Leir* while she was irremovable by reason of the estate which had vested in her by operation of law. She paid the rent weekly from the 2d of *June* 1831 to *March* 1832, and quitted on a week's notice. As soon as she obtained the letters of administration, she might have disaffirmed the weekly tenancy, and claimed to hold as tenant from year to year in right of her husband; but I think there is abundant evidence of her having confirmed the weekly tenancy, for she afterwards always paid the rent weekly, and quitted on a week's notice.

Then as to the other question, there were no sufficient premises to warrant the sessions in finding such fraud as would avoid the letters of administration, and prevent the leasehold estate of the husband from vesting in his widow. The pauper had a right to take out letters of administration, and a consenting mind that it should be done. She was only induced by the solicitor for *Great Glenn* to exercise that right, but there was no deceit practised by him; if there had, the case would have been different.

PATTESON

PATTESON J. In order to acquire a settlement by estate, the pauper must have resided forty days in the parish where the estate lay, and where her interest in that estate, by operation of law, still continued. If, before that time elapsed, she acquired an interest in her own right as weekly tenant, and resided in the parish in respect of that interest, she was not irremovable, and acquired no settlement. The sessions will probably find, on the evidence, that she had become a weekly tenant. The letters of administration are not void on the ground that they were obtained by fraud, because the widow had the right, and, indeed, was under a legal obligation, to take them out, and consented that they should be taken out.

Case to go back to the sessions, in order to ascertain whether the pauper became a weekly tenant within forty days after the letters of administration were taken out.

.1833.

The King
against
The Inhabit-
ants of
Great Glam.

1833.

The Bailiffs, Assistants, and Commonalty of
GUMCESTER, otherwise GODMANCHESTER,
against PHILLIPPS.

By an act for inclosing common lands in G., after reciting that the corporation of G. claimed the right of soil as lords of the manor, and that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted, that the commissioners might set out and allot plots of ground out of the *East and West Commons*, in G., as a

compensation for the rights of common of *all the owners and proprietors of commonable messuages or cottages*, for such messuages or cottages only, as well on the said commons as on certain other lands named; such plots of ground to be used and enjoyed as the commissioners should by their award direct. Parties dissatisfied with the award might bring an action against the persons in whose favour the determination should be, within three months, or might appeal within six months to the justices in quarter sessions, who were to determine the matter, and award costs and damages. In default of such action or appeal, the determination of the commissioners was to be final.

The commissioners, by their award, allotted a plot of land on the *West Common* as common pasture, to the *owners and proprietors of commonable messuages or cottages*, and their respective tenants or occupiers of the said messuages and cottages only having right of common on the said *West Common*; and they limited the use of the pastures as the act empowered them.

Before the passing of the act, the rights attached to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of G. Subsequently to the act, one of the messuages on *West Common* being in the hands of a person not a freeman, the corporation brought trespass against him, for turning his cattle on the above-mentioned allotment:

Held, that the act, though general in its words, did not authorize the commissioners to extend the benefit of their allotments in lieu of common, to occupiers who were not freemen; and that the award itself did not purport to do so; nor could it have done so unless the act had given power to the commissioners to ascertain who should be entitled to the newly granted rights: and consequently, that the present action was maintainable, though brought more than six months after the award.

TRESPASS for breaking and entering the plaintiffs' close, called the *West Common*, at *Godmanchester*, and depasturing it with cattle, &c. The defendant pleaded, first, not guilty, and then three pleas of justification under rights of common, upon which issues arose, to be tried by the country. The last of these pleas set out at length an act of parliament of 43 G. 3. (private), for dividing and inclosing certain open and common fields and lands in the parish of *Godmanchester*.

The act, after reciting, among other things, that the bailiffs, assistants, and commonalty of G. were lords of the manor of G., and, as such, claimed to be entitled to the right of soil within the said manor, and that certain indivi-

duals

duals were owners and proprietors of all the common fields, &c. intended to be inclosed, went on to appoint certain persons commissioners for valuing, dividing, setting out, allotting, and inclosing the said common fields, &c., and to give them authority for putting the provisions of the act in execution. It further empowered and required them to decide any dispute between parties claiming interest in the said division and inclosure, touching the right to the soil in the said commons, &c. The commissioners were to set out, allot, and award to the said bailiffs, &c., and their successors, as lords of the manor, a certain portion of the lands to be divided and inclosed, as a compensation for all their rights and interests as lords in and to the soil of all the waste or unknown common lands within the parish. And whereas there were certain meadows within the parish, containing 500 acres, belonging to several persons, but the lands were intermixed, and were subject to rights of common for commonable cattle at certain seasons, it was enacted that the commissioners should set out, allot, and award the said meadows to and among the persons who were owners in severalty, in such parcels as should afford them compensation, and also should allot to the persons entitled to common, not being proprietors, such part of the other commonable lands intended to be inclosed, as should be a compensation for their respective rights of common and other interests in the said meadows, and they were authorized to inclose the whole, or part of the said meadows as they should think proper. Then followed these clauses:—

“ But, for the full enjoyment of such part of the said meadows which shall be left uninclosed, the said com-

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPS.

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPPS.

missioners shall and may, and they are hereby authorised and empowered by their award to stint, ascertain, and express what number and sorts of cattle each of the proprietors of commonable messuages and lands in the said meadows shall be at liberty at seasonable times to feed or depasture thereon, and also to ascertain the time or times when such feeding and depasturing shall begin and end; and the same meadows from thenceforth shall be fed and depastured only by such number and sorts of cattle, and at such time or times, as in the award to be made by the said commissioners shall, for that purpose, be expressed.

“ Provided always, and be it further enacted, that the said commissioners shall set out, allot, and award, as and for a common pasture, to be used, stocked, and enjoyed as hereinafter mentioned, out of and from certain commons in *Godmanchester* aforesaid, called the *East and West Commons*, such plot or plots of land or ground as shall, in the judgment of the said commissioners, be a full equivalent, satisfaction, and compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said commons as on the said meadows and common fields, within the said parish of G., which said plot or plots of land shall be held, used, stocked, and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages and cottages only, as a common pasture, in such manner as the said commissioners shall in and by their award direct.”

The residue of the lands to be divided and inclosed under the act, was to be fairly allotted among the several proprietors and persons having interests therein.

By

By a subsequent clause it was enacted, "that in case any person or persons interested or claiming to be interested in the said intended division and allotments shall be dissatisfied with any determination of the said commissioners touching any claim or claims, or other rights or interests in, over, or upon the lands and grounds hereby directed to be divided, allotted, and inclosed, or any part thereof, it shall be lawful for the person or persons so dissatisfied to proceed to a trial at law of the matter so determined by the said commissioners, at the then next or at the following assizes to be holden for the said county of *Huntingdon*;" for which purpose the party so dissatisfied, upon giving notice of action within a month of the determination, should cause an action to be brought upon a feigned issue "against the person or persons in whose favour such determination should have been made," within three calendar months after such determination; and the verdict in such action should be final, binding, and conclusive upon all persons, unless the Court should set aside such verdict and order a new trial. But the determination of the commissioners touching such claims, rights, or interests in, over, or upon the lands directed by the act to be divided, &c. which should not be objected to, or respecting which, if objected to, the party complaining should not prosecute his action in due time, should be final and conclusive upon all parties. Proviso, "that nothing in this act contained shall authorize the said commissioners to determine the title to any messuages, cottages, lands, tenements, or hereditaments whatsoever." The party aggrieved, except in cases where the determination of the commissioners was declared to be final, and except in such cases where an

issue

1835:

The Bailiffs
of GOSMAN-
CHURCH
against
Pemberton.

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPS.

issue at law should be tried as before mentioned, might appeal to the quarter sessions within six calendar months next after the cause of complaint should have arisen, giving eight days' notice to the commissioners and to the parties concerned; and the justices were to determine the matter, and award costs and damages.

The act ended with a clause, saving the rights of all persons except those to whom any allotment should be made in pursuance of the act in respect of such rights and interests as were thereby intended to be barred.

The fifth plea stated, that before and at the time when, &c. the defendant was, and still is, seised in his demesne as of fee of and in a certain messuage, being one of the commonable messuages referred to in the act set out in the preceding plea; and that before and at the time of making that act the owner and proprietor of the said messuage for the time being had a certain right of common of pasture in, upon, and throughout a certain common, situate within the said parish of G., called the *West Common*, mentioned in the said act; that the plaintiffs are the successors of the bailiffs, assistants, &c. mentioned in the act; that the commissioners, on the 29d of June 1809, made and executed their award concerning the division and inclosure aforesaid, and did thereby "allot and award common pasture to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages or cottages, and their respective tenants and occupiers of the said messuages and cottages only having right of common upon the said common in G. aforesaid, known by the name of the *West Common*, the plot of land or ground there mentioned, that is to say; *West Common* allotment. Unto and for the owners and

occupiers of commonable messuages or cottages and toftsteads, and their respective tenants or occupiers of the said messuages, and cottages, and toftsteads, having right of common upon the *West Common* in G. aforesaid; one plot of land containing 171 acres," bounded, &c. And the said award gave directions (stated in the plea) as to the time of turning on cattle, and the number and kind to be turned on by the owners and occupiers, according to the list contained in a schedule to the award, &c. The plea then stated, that the plot of ground before mentioned, being the locus in quo, was part of the said *West Common*; that the defendant's messuage in that plea mentioned was inserted in the said schedule as one of those in respect of which the owner or occupier might use, stock, and enjoy the said plot of ground, being the close in which, &c. as directed by their award; and that by virtue of the act of parliament and of the award, the defendant, being seised and the occupier of the said messuage as aforesaid, at the times when, &c. had, and still of right ought to have, a right of common of pasture in and over the close in which, &c. that is to say, a right to stock the same with two cows on, &c. until, &c. as to the said messuage with the appurtenances belonging: and being so seised, he, on, &c. (within the limited time) entered, &c. to turn on, and did turn on, two cows, being his own cattle, &c. to pasture and use the common, &c. The sixth and seventh pleas did not materially differ from the fifth.

The eighth plea stated, as before, that the defendant was seised of a messuage, being one of the commonable messuages in the act mentioned: "and that all those whose estate he now hath, until the making of the award in the fourth plea mentioned, had and enjoyed, and of right

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPPS.

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPPS.

right ought, &c. for themselves, their tenants, and occupiers of the said last-mentioned messuage, *being freemen of the borough of Godmanchester aforesaid,*" a certain right of common of pasture in, upon, and over the said close in which &c. amongst other the open and common fields, commonable places, &c. within the said parish; and that the said close, in which, &c. called the *West Common*, at the time of the making of the act, was part of the open and common fields, &c. in the parish of G. in the said act mentioned. The plea then stated the making of the award and a schedule thereto, in which the commissioners inserted the messuage in this plea mentioned as one in respect of which the owner might stock upon the said *West Common* (being the locus in quo) during the times mentioned in the award. The defendant then justified under the act and award, as before; not stating himself to have been a freeman. The ninth and tenth pleas did not differ materially from the fifth.

Replication to the fifth plea, that at the time of the making of the act, "the owner and proprietor of the said messuage, now of the said defendant in the said plea mentioned, had *no other or different right of common of pasture* in, upon, and throughout the said common, called the *West Common*, mentioned in the said act of parliament, *than in respect of his being a freeman of the borough of G. aforesaid, and occupier of the said messuage*, and not in respect of his being occupier only of the said messuage; and that the said defendant, at the said several times, when, &c. in the said declaration mentioned, was not, nor is a freeman of the said borough." There were similar replications to the sixth, seventh, ninth, and tenth pleas. The replication to the eighth plea,

plea, after reciting the clause of the act (antè, p. 200.) directing the commissioners to award common of pasture out of the *East and West Commons*, as a compensation for the rights of proprietors of commonable messuages, went on as follows: "And the plaintiffs in fact further say, that under colour and pretence of the said enactment in the said act of parliament hereinbefore mentioned, the said commissioners awarded, and in the schedule to the said award did insert and specify, so far as respects the said messuage now of the said defendant, in manner and form and to the effect in the said eighth plea of the defendant in that behalf expressed; and the said plaintiffs further in fact say, that the said defendant, at the said time when, &c. in the said declaration mentioned, was not, nor at any time before or since hath been or is, a freeman of the said borough of G."

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPS.

Rejoinder to the replication to the fifth plea: That the owner and proprietor of the messuage in that plea mentioned, before and at the time of the making of the act, *had not a right of common of pasture* in and upon and throughout the said *West Common*, in respect of his being a freeman of the borough of *Godmanchester* aforesaid, in manner and form, &c. Conclusion to the country.

General demurrer to the replications pleaded to the sixth, seventh, eighth, ninth, and tenth pleas. Joinder in demurrer.

General demurrer by the plaintiffs to the rejoinder to the replication to the fifth plea. Joinder in demurrer. The demurrers were argued in last *Easter* term.

B. Andrews for the defendant. The replications demurred to are bad, as tendering immaterial issues. The question

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPS.

question cannot now be raised whether, previously to the award, the rights of common were in the freemen, as such, or not. The award under the act of parliament is now conclusive; the old rights, whatsoever they were, are gone, and new ones substituted; and it would be very hard that the original right should be enquired into after so long a time as has now elapsed. There must be a limit to disputes; and the only way to affix it, in this case, is to say that the award, made under the act, must be final. In *Phillips v. Maile (a)*, where the same question was raised under this act in the Court of Common Pleas, *Tindal C. J.* said, "We are of opinion that the original right of common, for which a new right has been substituted by the act, was not intended to be traversable, except in the way prescribed by the act." And the Court held the award conclusive. The plaintiffs here contend that the original right of common was solely in the occupiers of these messuages, being freemen; that the pleadings admit this; that the defendant was not a freeman; and therefore that the award, as to the common claimed in respect of the messuage in question, is void. [*Parke J.* The argument, I suppose; will be, that the commissioners had power only to set out common, over which the former commoners were to exercise their right, but that they were not to adjudicate who were or should be entitled.] They were to make the allotment, whether the owners of the several messuages were, at the time, freemen or not. If they were not so at the time, they or their children might become so; the right before latent would then be called into operation. [*Parke J.*

(a) 7 Bingt. 133.

The act does not provide for a specific allotment to be made in respect of particular messuages; the commissioners are only empowered to ascertain a right, to be exercised by the proprietors of commonable messuages, subject to a stint.] The defendant here was the owner of a commonable messuage, and the award (to which a schedule of particular messuages is annexed) gives the *West Common* allotment to "the owners and proprietors of commonable messuages." [Parke J. "Having right of common on the *West Common* aforesaid."] If the award did not give the new right of common to all who were proprietors of commonable messuages at the time, the inclosure alters their situation for the worse. Before the award was made, they might, at all events, have acquired rights of common by becoming freemen as well as occupiers, but now, according to the argument used, if they were not freemen at the time of the award, it finally excludes them from the right. Suppose the commoners had released their rights to the corporation, in consideration of a substituted right, which had been granted in the terms of this award, could the corporation afterwards have repudiated the grant, and said they only meant it to extend to owners of commonable messuages, "being freemen?" The argument on the other side would tend to admit parol evidence in explanation of an act of parliament. If the original rights may be enquired into now, the award is not binding and conclusive, though it has not been contested within the time and in the manner directed by the act; and it clearly might have been so contested, on the point now raised. [Parke J. They will contend that the award is only final so far as the commissioners had jurisdiction.] They had jurisdiction over the

1833.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPPS.

1893.

The Bailiffs
of Gouda
against
Partridge.

the subject matter, and have made their allotment in unequivocal terms. It may be supposed that, at the time of the award, there might have been only one or two owners of commonable messuages who were freemen; and it cannot be contended that, in such a case, the benefit of the allotment must have been confined to them. If the defendant's title, in this case, be not established by the award, all the claims of common founded upon it are likewise set loose, and all the rights which it gives liable to be disturbed.

Kelly contra. Although the defendant is not a freeman, it may be assumed that the person who held this commonable messuage, at the time of the award, was one; and if all the occupiers at that period were in the same situation, there would, of course, be no appeal against the allotment. The questions are, first, whether the commissioners had authority, under the act, to award rights of common to a totally different class of persons from those entitled before; and, secondly, whether they have, in fact, exercised such a power. There are no words in the act itself, giving power to conclude parties as to the rights then existing. It only refers generally to rights already in existence, empowering the commissioners to give equivalents for them, but not to determine the nature or extent of the rights. Certain persons, being freemen, have common on particular lands; the commissioners are to substitute other lands for these, to be enjoyed by the parties who had the former right, in such manner and at such times as the commissioners shall direct. And that is done by the award. The commissioners allot common pasture to be used by the owners and proprietors of commonable messuages, and

their tenants and occupiers of the said messuages only, having right of common upon the said *West Common*; meaning that the allotment is made as compensation for the rights they enjoyed when the act passed. There is no pretence for arguing that the act empowered them to raise a new right, independent of the former qualification of being freemen, and to say, "from henceforth the enjoyment shall be in the occupiers of commonable messuages generally." It would be an injustice to the plaintiffs, who are lords of the soil, if, without any equivalent given to them, the benefit in question were extended by the act to a more numerous class of persons. Their right, as lords, is not to be abridged by general terms in an award: *Place v. Jackson* (a). Besides, it was their interest that the advantage in question should be confined to their own freemen. And if the award was injurious to them in these respects, the case was not one to which, by the terms of the act, the remedy by appeal, or by action *against the party in whose favour the determination was*, could apply. There was no issue by which the question could have been tried; and if, at the time of the award, none but freemen were occupiers, there was no party against whom a complaint could be made. In *Phillips v. Maile* (b) the present point was not sufficiently pressed on the attention of the Court; and it was assumed there, whether justly or not, that the right disputed in the action "was capable of being litigated at the time of making the award." The question comes to this, whether there be any thing in the words of the inclosure act to alter the then existing rights, and to render the qualification of freedom no

1833.

The Bailiffs
of GODMAN-
CHURCH
against
PHILLIPS.

(a) 4 D. & R. 318.

(b) 7 Bing. 133.

1836.

The Bailiffs
of Godman-
cumbra
against
Paillures.

longer indispensable. The words to that effect ought to be express, this being an act granting rights to one party in another's soil. There is, indeed, a clause in general terms, directing that common shall be set out as a compensation to "all the owners and proprietors of commonable messuages;" but the generality of such words may be restrained by reference to the other matters stated in the act, as general words in a deed are qualified by a particular recital; and the more so in this case, inasmuch as no compensation is made to the plaintiffs for the supposed enlargement of rights to their prejudice. *Thorp v. Cooper* (a).

Andrews in reply. As to the last argument, the plaintiffs have a compensation expressly provided for them in the act. [*Littledale J.* That is in respect of their rights and interests in and to the soil of the waste and unknown common lands, which is entirely distinct from their interest in the soil over which common of pasture was claimed by the owners of commonable messuages.] The plaintiffs, at all events, have the benefit of so much of the lands as is not otherwise allotted. And if the act gives an extension of rights in one way to the proprietors of these messuages, it is but just, inasmuch as their rights are curtailed in another by the inclosure. [*Parke J.* They had the same benefit of common after the inclosure as before, only restricted in space. It does not appear that, before the inclosure, all the commonable messuages together were sufficient to consume the herbage. And if the condition of the owners was made worse, they might have appealed within the time limited

by the act.] The plain meaning of the statute is, that when the award is made, the rights in question shall depend upon the messuages, and not be affected by the condition of the owners. *Phillips v. Maile* (a) is a direct authority for the defendant.

1853.

The *Barons*
of *Godman-*
chester
against
Phillips.

Cur. adv. vult.

DENMAN C. J. in this term delivered the judgment of the Court. After having stated the pleadings as far as the rejoinder to the replication to the fifth plea, his Lordship continued as follows:

This rejoinder has been demurred to; there are no special causes of demurrer assigned; but we think it is bad, because it does not deny any allegation in the replication.

The plea alleges that the defendant, at the time of the act, had a right of common, in respect of being owner and occupier of the messuage.

Then the replication is, that, at the time of the act, the defendant had no other right of common than as being a freeman of the borough, and occupier of the messuage, and not as occupier only. Now this tends to an issue which the defendant might have accepted, and concluded to the country; but he says the owner of the house had not any right of common in respect of his being a freeman; which, though glancing at the real dispute, does not put it in a way which the plaintiff was bound to accept, and we think that the demurrer may be maintained, and then it is the same as if the defendant had demurred to the replication.

There are five other pleas, varying in some measure

(a) 7 Bingham, 135.

1888.

The Bailiff
of GORMAN
CHURCH,
against
PILLICOTT

from the fifth plea, to which there are replications, and demurrers to these replications; and upon all these the same questions arise as on the fifth plea and the replication to that plea.

And upon the pleading, it must be taken that, at the time of making the act, it was only such of the occupiers of messuages as were freemen of the borough that had a right of common.

And then the question is, if, upon the construction of the act of parliament now saved, the same limitation now continues, or whether the occupiers of those messuages are (as occupiers only) entitled to right of common.

The act of parliament itself is silent on this subject; but it appears by the act, that several persons had a right of common on some parts of the land mentioned in the act. And the act authorises the commissioners to make regulations for the enjoyment of the right of common on such part of certain meadows as should be left unenclosed.

And then comes the clause which applies to this case. [His Lordship then read the clause, ante, p. 200., directing the commissioners to set out common of pasture from the *East and West Commons*, as an equivalent for the rights of common of all the owners and proprietors of commonable messuages or cottages.]

According to the words of this clause, without further information, it would seem that all the owners of commonable messuages, as such, had the right, and more particularly by using the word *only* near the end of the clause; but then, when the further information is brought to bear upon the construction of the act, and which is admitted in the pleadings, that, at the time of

passing the act, it was only such occupiers of commonable messuages as were freemen; that had the right; it comes to be considered whether the act was meant to let in to the exercise of the common right all the owners of commonable messuages, without any qualification; or whether it was merely an enactment as to the place where the commoners were to exercise their right of common, but so that no other persons should be entitled than were before.

1839/
—
The Bailiffs
of Gillingham
claim
against
Philips.

The object of the act of parliament was, that the persons who had rights of property in the land, or rights of common on the land which was the subject of the act, should enjoy those rights more conveniently than they did before. But there is no indication in the act of any intention to confer any rights or benefits on persons who before had no rights there, but which the defendant wishes to introduce.

There is no reason why it should have been meant that a more extensive class of persons should have a right of common than before: there is no consideration for their doing so; and, therefore, we think that when the act speaks of common to be enjoyed by owners of customary commonable messuages (or cottages in general terms) it must mean such owners as had rights of common before the act, by being able to enclose land that the object of the clause in the act was to confine their exercise of the right of common to a particular spot, seeing that other places where before the act, they used to turn on cattle were to be inclosed.

The award could not extend the right to any further class of persons than the act mentions, unless powers had been given to the commissioners to ascertain what class of persons were entitled; but the act does not do

1883.

The Bailiffs
of GODMAN-
CHESTER
against
PHILLIPS.

that: it says, the right of common is to be enjoyed in such way as the commissioners shall direct, which means the number and species of cattle, and the times of the year when they are to be turned on, and other things of that sort; and, indeed, looking at the award itself, it does not carry the defendant's argument as to the extent of his right, at all further than the act itself; for the award is, that the common shall be enjoyed by the owners, &c., of messuages, &c., having right of common. If the words "having right of common" are to be taken as "having rights of common under the provisions of the act," it carries it no further than the act does; and if the words mean, "persons having right of common" when the act passed, then it excludes all who were not freemen, and therefore, in no point of view can the award carry the defendant's claim further than the act does.

And we are of opinion, that neither the act nor the award give the defendant any greater right than he had before the act, and that, therefore, there must be judgment for the plaintiffs. It is to be observed, that in the case of *Phillips v. Maile* (a), in which the judgment of the Court of Common Pleas was the other way, the point upon which we decide was not so distinctly brought to the notice of the Court, in the pleadings or in the argument.

Judgment for the plaintiffs.

(a) 7 Bing. 135.

1831

The King against The Inhabitants of RUTHIN

Settlement,
June 1831.

ON appeal against an order of justices, whereby *David Jones*, his wife, and family, were removed from the parish of *Ruthin*, in the county of *Denbigh*, to the parish of *Cwm*, in the county of *Ellist*, the sessions quashed the order, subject to the opinion of this Court on the following case.

The appellants admitted the pauper's settlement to be with them, unless he had acquired a subsequent one under the following circumstances.

The pauper took from *Mrs. Edisbury*, who was mortgagee in possession, a farm called *Tynyfirth*, in the parish of *Llanrhaidr yn Cimmerch*, in the county of *Denbigh*, as tenant from year to year, at the rent of £24. per annum. The tenancy was to commence according to the custom of the country, viz. as to the land, from *St. Andrew's Day* 1829, and as to the farmhouse and out-buildings, from the 1st of *May* following. The rent was made payable half-yearly, on the 25th of *March* and the 29th of *September* following, though according to custom, the first half-year was not to be called for until *St. Andrew's* 1830, and the second half-year on the 1st of *May* 1831. The pauper entered upon the premises at the appointed periods, and occupied the land until after the 30th of *November*, 1830, and the house and outbuildings until the 1st of *May* 1831. In *August* 1830, the mortgagor and mortgagee having agreed upon a sale of the property, and a purchaser having been found, the three parties met by appointment, and were

The first section of the statute 1 W. 4. c. 18., which enacts, "that from and after the passing of that act no person shall acquire a settlement by reason of the yearly hiring of a dwelling-house, building, &c. unless the rent for the same to the amount of 10*l.* at the least shall be paid by the person hiring the same," is prospective only.

1830,

The King
against
The Inhabit-
ants of
Barnet.

attended by the pauper's wife, whose husband sent her on his behalf, he having been desired by *Shaw*, the mortgagor, to come to pay his half-year's rent. Mr. *Edlisbury* insisting upon being paid the half-year's rent due the 25th of *March* 1830, and declining to complete the sale without it, the pauper's wife said that her husband was then unprepared, owing to its being demanded before the usual time, namely, *St. Andrew's Day*: whereupon *Shaw*, being anxious to avoid delay in order to get the business concluded, agreed, without the previous knowledge or request of the pauper, but with the consent of the pauper's wife, to pay the 12*l.* for the pauper; and did so. The pauper had not repaid the amount when the appeal was heard, but there had been disputed accounts between him and *Shaw*.

The year's holding as to the land, which was the principal taking, was begun and concluded, and the rent was due, and paid as before mentioned, while the *stat. 6 G. 4. c. 57.* was in operation, and before the passing of the act of 1 *W. 4. c. 18.*; but the year's holding of the house and outbuildings was not concluded until the 1st day of *May*, which was after the last-mentioned act came into operation. The court of quarter sessions found that the pauper had gained a settlement in *Isleworth in Middlesex*, and quashed the order, subject to the opinion of this Court upon the case.

Imagined on 20th March 1831

of *Justice* in support of the order of sessions. There was a payment of rent to the amount of 10*l.* while the *stat. 6 G. 4. c. 57.* continued in force, and it was not necessary that that payment should be made by the party hiring the tenement. That is required by the first section of 1 *W. 4. c. 18.*, which is prospective only;

though

though the second is retrospective, *Rex v. Dursley* (a). Besides here the half year's rent was paid to the landlord with the consent of the pauper's wife, and she was authorised by her husband to give such consent. Stark was his agent.

1833.

The King
against
The Inhabit-
ants of
Rutland.

J. Jervis contra. The 12*l.* was paid by the mortgagor to the mortgagee in consideration of the latter giving up possession of the land. The statute 1 *W. 4. c. 18.* is retrospective in both sections; and if that be so, the rent must be paid by the party hiring the tenement. The words, "by the person hiring the same," which were in the previous act of 50 *G. 3. c. 50.* are omitted in the 6 *G. 4. c. 57.*; and under that act it was decided in *Rex v. Ramsgate* (b) that the whole year's rent, whatever its amount might be, must be paid; in *Rex v. Kibworth Harcourt* (c), that the rent need not be paid by the party hiring; and in *Rex v. Ditchampt* (d), and *Rex v. Great Bentley* (e), that a person who rented premises at the yearly value of 10*l.* and resided thereon, but underlet part, thereby gained a settlement. The stat. 1 *W. 4. c. 18.* rectifies that doubt, had arisen with respect to the intention of the legislature on these several points, and then enacts, that no person shall acquire a settlement by reason of a yearly hiring of a tenement, unless the occupation and payment of rent be "by the person hiring the same." Here there was no payment by the tenant himself. The wife had no authority to consent. She was sent by her husband, but not for the purpose of paying the rent or authorising any one to

(a) 9 *B. & Ad.* 465.(c) 7 *B. & C.* 790.(e) 10 *B. & C.* 580.(b) 6 *B. & C.* 712.(d) 9 *B. & C.* 176.

1833.

The King
against
The Inhabit-
ants of
RUTHIN.

pay it in his behalf. The payment was made by the mortgagor. The facts might have been evidence to support a plea of accord and satisfaction, but not of payment.

DENMAN C. J. The only question here is, whether the rent to the amount of 10*l.* has been actually paid. The party entitled to receive the rent has been satisfied, and the stat. 6 G. 4. c. 57. does not require that it should be actually paid by the party hiring. The sessions might have decided this case themselves.

LITTLEDALE J. concurred.

PARKE J. The rent to the amount of 10*l.* has been paid by some person, and that is sufficient. The second section of the 1 W. 4. c. 18. is retrospective; but the first is prospective only. The enactment is, that from and after the passing of that act, no person shall acquire a settlement except as there stated.

PATTESON J. The first section of 1 W. 4. c. 18. prevents the gaining of a settlement, unless the rent to the amount of 10*l.* at the least shall be paid by the party hiring; if that were retrospective, section 2, which provides, that where the yearly rent shall exceed 10*l.*, payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under the recited act, would have been unnecessary.

Order of sessions confirmed.

1833.

The KING *against* The Inhabitants of St.
NICHOLAS, ROCHESTER (a.)

ON appeal against an order of two justices, whereby *Cooper Tress* and his wife and children were removed from the parish of *St. Margaret*, in the city of *Rochester*, to the parish of *St. Nicholas*, in the same city, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper, *Cooper Tress*, on the 3d of *October*, 1831, took a lease for a year of a house in the appellant parish, at the rent of 40*l.* per annum. Under this lease he entered into possession of the house, and remained there with his family until the 3d day of *October* in the following year; he paid the rent for half the year, and fulfilled all the conditions of the statutes 6 *G. 4. c. 57.*, and 1 *W. 4. c. 18.*, unless the Court should be of opinion that, under the following circumstances, the house was not occupied by the pauper within the meaning of the 1 *W. 4. c. 18.*

The house in question was a separate and distinct dwelling-house, consisting of three floors. When the pauper had been in possession of the premises about three months, viz. on the 4th of *January*, 1832, he underlet the two upper floors, unfurnished, to one *Boucher*; and during all the time *Boucher* staid in the house, the pauper occupied the ground-floor only, by

of 6 *G. 4. c. 57.* and 1 *W. 4. c. 18.* were complied with, it was held, gain a settlement.

To give a settlement by renting a tenement, since the stat.

1 *W. 4. c. 18.*, there must be an occupation in fact of the whole dwelling-house or building of which the tenement consists, by the party hiring the same; and, therefore, where *A.* took a lease for a year of a house consisting of three floors, at the rent of 40*l.* per annum, and after he had been in possession three months, underlet two floors by the quarter, at the rate of 22*l.* per annum, to another person, who occupied them for two quarters, the ground-floor only, during that time, being occupied by *A.*, and in all other respects the provisions that *A.* did not

(a) This case, (which was determined in *Hilary* term 1834,) being of great practical importance, it has been deemed advisable to insert it here.

himself

1833.

The King
v. The Inhabitants
of St. Nicholas,
Borough.

himself and his family. *Boucher's* agreement with the pauper was, that he should take these two floors of the pauper by the quarter, at the yearly rent of 22*l.*; that *Boucher* should have the use of a wash-house on the ground-floor in common with the pauper, and that the pauper should have a sleeping-room in the upper floor for one of his children, whenever *Boucher* did not want it for his own family. *Boucher* entered into possession of the two floors on the 4th of *January*; furnished the rooms himself, staid in them upwards of two quarters, and paid the rent agreed on. During *Boucher's* residence there, he had the joint use of the washhouse, and the pauper's child, by the permission of *Boucher*, occupied the sleeping-room in the upper floor about a fortnight or three weeks according to the agreement. The ground-floor was not separated from the upper floors by any door or partition, and both the pauper and *Boucher* during *Boucher's* residence in the house, had common access to it by the front and back doors, and each took the key of the front door whenever he had need of it, without asking permission of the other.

Walsh and *Espinasse* in support of the order of sessions. The question in this case is, whether there was an occupation of the house by the pauper sufficient to satisfy the stat. 1 W. 4. c. 18. *Rex v. North Collingham* (a), and *Rex v. Tombridge* (b), shew that a party who rented a dwelling-house at the annual rent of 10*l.*, and resided in it, but underlet part, would have gained a settlement under 59 G. 3. c. 50.; but that statute required that the house should be held, and the land

(a) 1 B. & C. 578.

(b) 6 D. & C. 88.

occupied,

1833.

The King
against
The Inhabit-
ants of
St. Nicholas
Rochester.

occupied by the person hiring the same. The statute 6 G. 4. c. 37. omits the word "held," and the words, "by the person hiring the same," and requires that the house, building, or land shall be occupied under the yearly hiring; and in *Rex v. Ditchet* (a) and *Rex v. Great Bentley* (b), a pauper who rented a dwelling-house of the yearly rent of 10*l.*, and resided in it, but underlet part, was deemed to occupy the whole under the yearly hiring, so as to gain a settlement under this statute. *Littledale* J., in the former case, goes fully into the meaning of the word occupy, and says, "It is not necessary, in order to make a man an occupier, that he should actually sleep or take his meals in a house; or that his family should actually dwell in the whole house, but the law considers him, for this purpose, an occupier, if he hold the whole, and by himself or his family occupy part," and afterwards he says, "the word occupation, as applied to a house, undoubtedly implies personal residence. But if a lessee of a house dwell in any part of it, though he let the other part, he, in point of law, is to be considered as the occupier of the whole." That observation applies to the present case. It is true that the statute 1 W. 4. c. 18. requires that the house, &c. shall be actually occupied under the yearly hiring by the person hiring the same; but those words will be satisfied if the party hiring is personally resident by himself or his family; for such a person, though he underlet part of the house to lodgers, actually occupies. In *Fludier v. Lombe* (c) the question was, whether certain house-holders of houses above the value of 10*l.* a year, who paid the parish and other rates in respect of their

(a) 9 B. & C. 176.

(b) 10 B. & C. 530.

(c) *Cas. temp. Hardw.* 307.

houses,

1833.

The King
against
The Inhabit-
ants of
St. Nicholas,
Bromwich.

houses, but underlet part of the houses to lodgers on such terms as reduced their rents below 10*l.* per annum, were legal voters within the statute 11 G. 1. c. 18. s. 7., which enacted, "that the right of election of aldermen and common councilmen should belong to freemen of the city of *London*, being *householders*, paying scot and bearing lot;" and Lord *Hartwicke* said, that their letting lodgings did not make them cease to be the sole occupiers. The word *occupy* ought to receive the same construction in this statute as it has in other statutes relating to the poor laws. The 43 *Eliz.* c. 2. imposes the rate for the relief of the poor on the occupier. The person who rents a house and resides in it, though he underlets part, is deemed to be the occupier for the purpose of rateability. In *Nolan's Poor Laws*, vol. i. 176., it is said that "no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is, in the eye of the law, the tenant for the whole, and is rated as an occupier." If a different construction be put upon the word *occupier* in this statute, the consequence will be that the same party may be an occupier for the purpose of being rated, and not for the purpose of gaining a settlement. Great inconveniences will follow from such an interpretation. As the case was put at the sessions, if this construction prevailed, the mayor of *Maidstone*, who occupies a house of considerable value in that town, and lets part of it during the assizes for the accommodation of the Judges, would be prevented from gaining a settlement.

Cresswell and *Hills* contra. The opinion delivered by *Littledale* J. in *Rex v. Ditchet* (a) was, that a lessee

(a) 9 B. & C. 176.

who

who dwells in any part of a house, and underlets the other part, might be considered occupier of the whole, so as to satisfy the statute 6 G. 4. c. 57., which merely required the house to be occupied under the yearly hiring; but the statute 1 W. 4. c. 18., which was passed partly for remedying the inconveniences produced by that decision, requires an occupation in fact, and not merely in point of law. That this is the meaning of the statute is to be collected as well from the enacting words as from the doubts recited in the preamble. The statute 59 G. 3. c. 50. required that the house should be held, and the land occupied; and in *Res. v. North Colliingham* (a), Lord Tenterden relied on that difference of expressions, as shewing that it was probably intended that a party taking lodgers, properly so called, should not be prevented from thereby gaining a settlement. Now when the legislature, in the 1 W. 4. c. 18., omitted the word held, and required that the house or building &c. should be actually occupied by the party hiring it, they must have intended to prevent a party taking lodgers from gaining a settlement. In *Res. v. Thubridge* (b), Maynard, the joint occupier, never agreed with the original landlord; he agreed with the pauper to share the expence and the profits arising from the cultivation of the garden. [Patteson J. The landlord might have sued the pauper for the whole rent, but the latter was not the sole occupier. The joint occupation of the land there would have given a settlement if the value had been sufficient. Here the value of the house is sufficient; and the joint occupation would have been sufficient, if the case had depended on 59 G. 3. c. 50. The question is, whether the statute 1 W. 4. c. 18. re-

1883.

The King
against
The Inhabit-
ants of
St. Nicholas,
Bromwich.

(a) 1 B. & C. 583.

(b) 6 B. & C. 88.

quires

1853.

The King
against
The Inhabit-
ants of
St. Nicholas,
Rochester.

quires that the "*distinct dwelling-house, or building, or land,*" of which the tenement is to consist, should be occupied by the party hiring. The statute 6 G. 4. c. 57. was passed to obviate doubts, and enacted that no person should gain a settlement by the renting of a tenement, unless such tenement should consist of a separate and distinct dwelling-house, or building, or of land, or of both, rented by such person for the sum of 10*l.* a year for the term of one whole year; nor unless *such* house (*viz.* a separate and distinct dwelling), or building, or land, should be occupied under *such* yearly hiring; and *Rex v. Ditchet (a)*, and *Rex v. Great Bentley (b)*, shew that the doubt on that statute, whether a party who hired a house or land for a year, and occupied part of it, and underlet the residue, occupied under the yearly hiring, so as to satisfy the statute. It was decided that he did; and that partly on the ground that the words *by the party hiring the same*, which were in the 59 G. 3. c. 50., were omitted in the 6 G. 4. c. 57. Then an attempt was made to remedy the inconvenience resulting from those decisions, by a third statute, the 1 W. 4. c. 18., which recites the 6 G. 4. c. 57., and that doubts had arisen respecting the intentions of the legislature concerning the occupation of such house, building, or land, by the person hiring the same. Now, those doubts were, whether it was necessary that the party hiring the house should actually occupy the whole, or whether it was sufficient that he occupied part, though he underlet the rest. The statute then enacts that no person shall acquire a settlement by reason of *such* yearly hiring of a dwelling-house, or building, or of land, or of both,

(a) 9 B. & C. 176.

(b) 10 B. & C. 520.

as in the former act expressed, unless such house, or building, or land, shall be *actually* occupied under *such* yearly hiring by the person hiring the same. The words "such" yearly hiring are important, because they refer to the 6 G. 4. c. 57., which is recited, and therefore evidently mean the yearly hiring of a distinct and separate dwelling-house and building, or land. The statute of 1 W. 4. c. 18. must be read as if it enacted, in express terms, that no settlement should be gained by reason of the yearly hiring of a *distinct and separate* dwelling-house, &c., unless such distinct and separate dwelling-house, &c. should be *actually* occupied by the party hiring the same. Now, here the dwelling-house hired by the pauper was not *actually* occupied by him; two thirds of it were occupied by another person. He might be liable as an occupier to pay rates and taxes; but in that case a constructive occupation is sufficient. Here an occupation in fact is required; but the lodger might have excluded the pauper from the two thirds. The case put, of the Mayor of *Maidstone* letting part of his house, during the assizes, for the accommodation of the Judges, is an extreme one. To put another case: suppose a party were to let all the house but a space six feet square, would he be settled? [*Paterson J.* Difficulties of this kind may be raised either way. Suppose he let a bed for the night. Or put the case of an innkeeper.] Merely taking an inmate, as an innkeeper, would not be sufficient; no part of the house is there given up; the inmate only has the use of it for a certain purpose. In *Rex v. Macclesfield (a)*, the pauper had let part of the house to a tenant; and

1833.

The King
against
The Inhabitants of
St. Nicholas,
Birmingham.

(a) 2 B. & Ad. 870.

1893.

The King
against
The Inhabit-
ants of
St. Nicholas,
Rochester.

Parke J. said that such an occupation would not have been sufficient to satisfy the stat. 1 W. 4. c. 18. [*Littledale J.* That statute requires the occupation to be under the yearly hiring. If he had underlet for a less period than a year, would there have been a sufficient occupation?] If underletting for the whole twelve months would prevent the party from being an occupier, it is difficult to say how it can be otherwise, where he lets for a less period than a year. If he excludes himself from part of the premises, so that trespass would lie against him for entering that part, he cannot, while that is the case, be said to be the occupier of such part. [*Littledale J.* That rule would prevent all lodging-house keepers from gaining a settlement by renting.] That undoubtedly would be so. The object of the legislature was not to favour one kind of settlement or other; and the act having been introduced to avoid ambiguities, it is more important that its meaning should be rightly ascertained, and a simple rule of settlement given, than that one or another class of persons should or should not be settled under particular circumstances which may be suggested.

DELMAN C. J. The meaning of the word *occupied* may vary according to the occasion or the subject-matter. The meaning, therefore, which it has received in considering what occupation was necessary to constitute a mansion-house in which burglary might be committed, or to give a right of voting, or to make a party rateable to the relief of the poor, is no test of its meaning in this particular case. A new distinction is introduced by the stat. 1 W. 4. c. 18. Under the former statute, 6 G. 4. c. 57., a constructive occupation

tion was sufficient. This statute requires an occupation in fact. It recites the former act, and that doubts had arisen with respect to the intentions of the legislature concerning the occupation of *such* house, building, or land, by the person hiring the same, and enacts, that "no person shall acquire a settlement in any parish by reason of *such* yearly hiring of a dwelling-house or building, or of land, or of both, *as in the said act expressed*, unless *such* house or building, or land, shall be *actually* occupied under such yearly hiring by the person hiring the same." A constructive occupation will not satisfy these words. The statute requires in terms an actual occupation. Here it appears that the pauper underlet the two upper floors, and occupied the ground floor himself. It is impossible to say, in the face of the statute, that the pauper, who occupied the ground floor only, actually occupied the whole house. The consequences resulting from this statute are remarkable: a person of whatever degree of respectability who hires a house by the year at a high rent, and underlets a part of it, will be prevented from acquiring a settlement by renting. But whatever the consequences may be, I must say that the words which the legislature has used prevent a settlement being gained in this case.

1833.

The King
against
The Inhabit-
ants of
St. Nicholas,
Rochester.

LITTLEDALE J. What I am reported to have said in *Rex v. Ditchet* (a) as to the meaning of the word *occupation*, applies to a constructive occupation only, which was sufficient to satisfy the statute that governed that case. The stat. 1 W. 4. c. 18. referring to the 6 G. 4.

(a) 9 B. & C. 176.

1838.

The King
against
The Inhabit-
ants of
St. Nicholas,
Rochester.

c. 57., enacts, that no person shall acquire a settlement by such yearly hiring of a dwelling-house, &c. unless such house, &c. shall be actually occupied under such yearly hiring by the person hiring the same. That evidently means an occupation in fact. But in this case another party, not the person hiring, had a right to occupy two thirds of the premises; there was not, therefore, an occupation in fact of the whole house by the pauper, for he could not in an action of trespass justify going into the rooms which he had let; he had parted with all right to them from quarter to quarter. The word *actually* must have effect given to it; and giving the word full effect, it must mean occupation in fact, as distinguished from a constructive occupation. To the question I put during the argument, whether it would make any difference if the underletting were for a less period than a year, the proper answer has been given. If there be not an actual occupation of the whole house, within the statute, when part of it is let for a year, neither would there be when part of it is let for a week. It may be said that, deducting 22%, which the under-tenant in this case was to pay, from the whole rent of 40%, that part of the premises which the pauper retained was still rented at 18%: but this cannot be taken into consideration. There must be an actual occupation of the whole house. The consequence undoubtedly will be, that all persons who let lodgings will be prevented from gaining a settlement by renting a tenement of any value. But it is better to adhere to the plain words of a statute than to depart from them on the ground of some supposed inconvenience.

TAUNTON

TAUNTON J. It is a safe rule of construction to adhere, on all occasions, to the language of a statute. It has been often much lamented, that the Judges have departed from the plain and literal construction of the statutes relating to the settlement of the poor. On the language of this statute, which was made to remove doubts arising as to occupation, I have no hesitation in saying, that it requires an occupation of the whole house by the party hiring. The word "*such*," which comes before the words "yearly hiring," is very material, because, by reference to the recited statute, it must be taken to mean the yearly hiring of a separate and distinct dwelling-house or building, or land, or both. There must be an occupation in fact, of a separate and distinct dwelling-house, and not only under the yearly hiring, but also by the person hiring the same. Now, were all these conditions performed here? The pauper took a distinct and separate dwelling-house at 40*l.* a year, but divided the occupation of that dwelling-house between himself and *Boucher*. The latter probably had the larger part; but whether that was so or not, is immaterial. We cannot say that the pauper actually occupied a separate and distinct dwelling-house under the yearly hiring, when there was an exclusive occupation of part by another person. I am therefore satisfied that there was not an actual occupation within the meaning of this statute. The order of sessions must be quashed.

PATTESON J. I am of opinion, on the plain words of this statute, that no settlement was gained by the pauper. The words "*actually occupied*" put an end to
all

1833.

—
The King
against
The Inhabit-
ants of
St. NICHOLAS,
ROCHESTER.

1833.

The King
against
The Inhabit-
ants of
St. Nicholas,
Rochester.

all question; and the case must be considered as if the word "*actually*" were incorporated in the former statute, which is not repealed by the 1 W. 4. c. 18. Then reading the 6 G. 4. c. 57., as if that word as well as the words "by the party hiring the same," were incorporated in it, it will prevent any one from acquiring a settlement by renting a tenement, unless such house or building (that is, the separate and distinct dwelling-house, or building, or land, or both, of which the tenement is required to consist), shall be actually occupied under the yearly hiring, by the party hiring the same, for the term of one whole year. Now in this case it is clear that the whole dwelling-house was not actually occupied by the party hiring the same; part of it was occupied by another person. The decisions on the liability of persons to be rated, and their rights of voting, as occupiers, which have been referred to, are not affected by this case.

Order of sessions quashed.

In the Matter of CULLEY.

The Court, on the application of the Crown, set aside a coroner's inquisition, for defects apparent on the face of it. Rule absolute in the first instance.

A CORONER's inquisition, taken on view of the body of *Robert Culley*, stated that on, &c. at, &c. a public meeting of a great number of persons then and there assembled, took place, in consequence of a certain placard, "to adopt preparatory measures for holding a national convention," and that the said *Robert Culley*, being one of the constables of the metropolitan police, in the execution of his duty, was present; and that a person, to the jurors unknown, in and upon the said

Robert

Robert Culley, in the peace of God and of our said lord the King being, did make an assault, and him, with a certain sharp instrument, did strike, stab, and penetrate; and by such striking, stabbing, and penetrating, did give unto the said *Robert Culley* a mortal wound, of which he died. It then proceeded as follows:—And the jurors aforesaid upon their oaths do say, that we find a verdict of justifiable homicide, from no riot act or any proclamation ordering the people to disperse being read; and we consider that government did not take proper measures to prevent the meeting, and that the conduct of the police was brutal, ferocious, and unprovoked by the people; and we hope that government will take such steps in future as will prevent the occurrence of such disgraceful scenes. In this term

1853.

In Re
Culley.

The Solicitor-General (having, on the preceding day, obtained a certiorari to bring up the proceedings), moved (May 30th), that the inquisition might be quashed, on the ground that it was bad in point of law; and that, as it might be evidence on an indictment relative to the same transactions, it ought not to be suffered to remain on record. Independently of this reason, such an inquisition may, undoubtedly, be quashed by the Court for defects apparent on the face of it (a). [*Dezman Q. J. C.* Must not the application to quash it be made by a party interested?] The present application is made on the part of the crown, which has an interest in the administration of justice. The jury, by the inquisition, state that the killing of *Culley* was justifiable homicide, not because he

(a) *Dearing's case*, Cro. Eliz. 193. *Francis Oily's case*, Cro. Jac. 635. *Re v. Hetherall*, 3 Mod. 80. *Anonym.* 12 Mod. 112.

had

1833.

 In Re
Culley.

had given any provocation to the party who assaulted him, or because that party was wholly free from blame, but because certain other persons, viz. the magistrates or the government, had not done what the jury thought ought to have been done, and because the conduct of the other policemen was not what it ought to have been. To make homicide justifiable, the party killing ought to be wholly free from blame. There is nothing to shew that the person who inflicted the wound on *Culley* was blameless. There is sufficient ground for quashing the inquisition, or, at least, for granting a rule nisi. [*Patterson J.* It is the ordinary practice at the assizes to quash coroners' inquisitions for defects apparent on the face of them.]

DENMAN C. J. The inquisition is a nullity. I doubt whether there is any finding at all. The jury, in effect, say that the slaying of *Culley* was justifiable because certain other persons had either acted improperly or been guilty of neglect of duty. There is no pretence for saying, on the facts found, that it was justifiable homicide. There is nothing to shew that the deceased had ever given any provocation for the assault. I entertained at first some doubt whether the inquisition ought to be quashed by this Court except on the application of some party interested. On further consideration, however, I think it may be quashed on the application of the Crown, which has an interest in the general administration of justice.

LITLEDALE, PARKE, and PATTESON Js. concurred.

Inquisition quashed.

1833.

The KING on the Prosecution of MICHAEL *Saturday,*
 SCALES against The Mayor and Aldermen of *June 1st.*
 LONDON.

THE return to the mandamus, which had issued in *Trinity* term 1831, at the instance of the prosecutor, having been adjudged to be good in law (*a*), the latter afterwards brought an action (which was now pending) against the mayor and aldermen for a false return. In *January* 1832 another election of alderman took place in the ward of *Portoken*, when Mr. *Hughes* and Mr. *Scales* were the two candidates, and *Scales* again had a majority, and he was returned to the court of aldermen as duly elected, but they admitted and swore in *Hughes*. An information in the nature of a *quo warranto* was then filed against *Hughes*, who suffered judgment of ouster to be entered against him. Upon

By custom the court of mayor and aldermen of *London* have always had authority to examine and determine whether or not any person returned to them by the court of wardmote as an alderman is, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whenever the fit-

ness and qualification of the person so returned has been brought into question. In *February* 1831, *M. S.* was elected alderman by the citizens, and returned as elected to the court of mayor and aldermen. That court, on the petition of persons interested in the election, adjudged and determined that *M. S.* was not a person fit and proper to discharge the duties of alderman. In *January* 1832 *M. S.* was a second time elected alderman by a majority of votes, and returned so elected to the court of mayor and aldermen, but they again refused to admit him to the office.

A rule nisi having been obtained for a mandamus to admit *M. S.* to the office,

Held, that an affidavit stating that the court of mayor and aldermen had again determined that he was not a fit and proper person to be admitted, is no ground for refusing the mandamus, because the prosecutor has a right to have the facts stated in the return, in order that he may have an opportunity of controverting the truth of them :

Held, at all events, that the affidavits in answer to the rule ought to shew that the court of mayor and aldermen had, on the second occasion, come to the conclusion that *M. S.* was not a fit and proper person to be admitted to the office, on a fresh investigation.

A mandamus having issued, the return stated that *M. S.* was elected by a majority of votes, and returned as so elected to the court of mayor and aldermen ; that a petition was presented to that court against *M. S.*'s admission to the office, whereupon they examined the merits of the petition according to custom, and determined that he was not a fit and proper person to be admitted to the office, nor *duly elected* ; and further, that he was not in fact *duly elected* : Held, that this return was not inconsistent.

(c) 3 B. & Ad. 255.

1835.

The King
against
The Lord
Mayor and
Aldermen of
London.

affidavits stating these facts, the Court in last *Hilary* term granted a rule nisi for a mandamus, directed to the defendants to admit *Scales* as an alderman of the ward of *Portsoken*, but pending that rule, stayed the proceedings in the action for the false return to the mandamus which formerly issued. The affidavits in answer to the rule set forth the immemorial custom for the court of mayor and aldermen to judge of the fitness of the person elected to fill the office of alderman, and the bye law of 1714, as to the mode of conducting the election (a), and then stated, that on the 3d of *January* 1832 the lord mayor reported the proceedings on the second election of *Scales*, whereby it appeared he had a majority of votes; that a petition was presented to the court of aldermen by freemen inhabitant householders and electors of the said ward, the proceeding in the action for a false return being stayed in the mean time, against the admission and swearing in of *Scales* to the office of alderman, to the effect that he was not eligible to be a candidate, for that he was not a person fit and proper to support the dignity of the office, and discharge its duties, nor to be admitted and sworn into it; and also that he had not been duly elected. The affidavits then stated that *Scales* petitioned the court of mayor and aldermen to be admitted, and also presented himself before the court, for the purpose of being sworn in, as having been twice elected by the freemen of the ward; whereupon, and as it appears by an entry of the proceedings of the said court of mayor and aldermen so holden on the said 3d day of *January* last, all the said several petitioners were called in, and the petitions were openly read in their presence and in that of *Scales*, and the said several petitioners

(a) 3 B. & Ad. 257.

were

were fully heard in support of the allegations contained in the several petitions, by themselves and their agents. It then stated that the said court having taken the several petitions into consideration, and having heard the several petitioners as aforesaid touching the merits of the said election, and also the qualification and fitness of *Scales* to be such alderman; and having referred to the minutes of the proceedings of the several courts of aldermen held on the several days therein specified, it appeared that *Scales* was on the said 10th day of *May* 1831 adjudged by the court of mayor and aldermen to be not a person fit and proper to support the dignity and discharge the duties of the office of an alderman of the said city, nor a fit and proper person to entitle him to be admitted and sworn into the office of alderman; and that due deliberation being thereupon had, the said court of mayor and aldermen, so holden on the said 3d day of *January* 1832, did adjudge and determine, according to their discretion and sound consciences, that the said *M. Scales*, from the said 10th day of *May* 1831, and continually from thence hitherto, had been, and then still was, not a person fit and proper to support and discharge the duties of the said office of alderman, nor a fit and proper person to entitle him to be admitted and sworn into the office of alderman, according to the custom of the said city; and that the said court of mayor and aldermen, so holden on the said 3d of *January* last, did further adjudge and determine that the said *M. Scales* was not duly elected to be alderman at the election. In *Hilary* term last,

1833.

The King
against
The Lord
Mayor and
Aldermen of
London.

Campbell, Solicitor-General, *Law*, and *Follett*, shewed cause. It would be useless to grant a mandamus, because it is manifest, from the affidavits, that a return would be made similar to that which the Court has

1832:

—
The King
against
The Lord
Mayor and
Aldermen of
London.

already adjudged to be good. The affidavits shew that, on the 3d of *January* 1832, the court of mayor and aldermen again adjudged that *Scales* was not a fit and proper person to be admitted. [*Littledale J.* It does not distinctly appear that they had any fresh investigation on the 3d of *January* 1832, or that witnesses were examined, or whether the mayor and aldermen did not found their judgment on what had been done by them in the preceding year. A new state of things has arisen; a fresh election has taken place. Although Mr. *Scales* may have been unfit in *January* 1831, it does not necessarily follow that he was unfit in *January* 1832. Besides, he ought to have an opportunity of controverting the facts stated in the affidavits; and that he cannot have, unless a return be made.] The affidavits state that the court of mayor and aldermen "took the petitions into consideration, heard all the petitioners touching the merits of the said election, and the qualification and fitness of *Scales* to be alderman; and having referred to the minutes of the former proceedings, and due deliberation being thereupon had, the said court of mayor and aldermen so holden on the 3d of *January* last did, according to their discretion and sound consciences, adjudge that the said *M. Scales* from the said 10th of *May* 1831, and continually from thence hitherto had been, and then still was not a person fit and proper to discharge the duties of the said office of an alderman of the said city, &c." He had no right to be admitted, unless the court of mayor and aldermen, according to their discretion and sound consciences, thought fit to admit him; and it was not necessary for them to examine witnesses.

Sir *James Scarlett*, contra, was stopped by the Court.

DENMAN

DENMAN C. J. We think this rule must be made absolute, on the ground that it is left uncertain by the affidavits, what was done on the 3d of *January 1832*. That ought to be distinctly before the Court. The facts stated in the affidavits may furnish materials for making a sufficient return, and if such return be made, the prosecutor may then have an opportunity of disputing the facts stated in it.

1833.

—
The King
against
The Lord
Mayor and
Aldermen of
London

LITLEDALE J. The affidavits do not state distinctly whether *Mr. Scales* now is or is not an improper person to fill the office of alderman. If he is now an improper person, that ought to be so returned. There are facts stated in the affidavits that may be a ground for such a return, but the defendant ought to have an opportunity of controverting them. The question is, not what the power of the mayor and aldermen is, but whether they ought to make a return to the mandamus, and I think they ought. They may then state what they think proper. If they make a return, the defendant ought to have an opportunity of taking the opinion of the Court upon its sufficiency in point of law, or of denying the facts stated in it.

TAUNTON J. The rule ought to be made absolute, principally on the ground that this is a new transaction, and that *Mr. Scales* ought to have an opportunity of controverting the truth of the facts on which it is alleged that he is not now eligible. He has no opportunity of doing so upon this interlocutory motion; but he will have that opportunity when the return is made. Supposing the court of mayor and aldermen should make the same return as to the right which they formerly did, and that *Mr. Scales* should be advised to controvert the legality

1833.

The King
against
The Lord
Mayor and
Aldermen of
LONDON.

and sufficiency of it, admitting the facts stated in it to be true, this Court would probably come to the same conclusion as it did on the former occasion; but he has a right to deny the truth of the facts stated in the return, and there is one very material fact stated on affidavit, viz. the existence of that immemorial custom by which the corporation claims a right and power to decide upon the fitness of the individual elected by the citizens. He may be advised to deny that custom; and if the mandamus does not go, no return can be made as to this second election, and he will be, as to that, without remedy. As to the former action, if he proceeded in that, it might be said that he had waived his right of contesting the first return, by appearing as a candidate at the subsequent election.

PATTESON J. I think the rule ought to be made absolute. It is true the action for the false return, which was stayed, is still depending, but Mr. *Scales* cannot have the same remedy in that action as he may in one brought for a false return to the present mandamus. The question is not the same. Even on that ground alone, I think the mandamus ought to go. I am of opinion, also, that the affidavits do not so fully disclose that every thing has been done that ought to have been done, as to make a return unnecessary. The court of mayor and aldermen will state in their return what they have done on the second election, and then the prosecutor will have an opportunity of demurring, or taking issue upon any fact returned.

Rule absolute for a mandamus.

The return was in similar terms to that in 3 *B. & Ad.* from p. 255. to 257., stating the ancient custom there set

set out, and the bye laws made in the reigns of *Richard the Second* and *Queen Anne*. It then stated that a court of wardmote was holden on *Tuesday* the 6th of *December* 1831, and by adjournment on other subsequent days, in and for the said ward of *Portoken*, before the then mayor of the said city, by virtue of a precept for that purpose before then duly issued according to the custom of the city, for the election of an alderman of the ward in the room of *Sir J. Shaw*, resigned, the said *M. Scales*, who had been returned to the court of lord mayor and aldermen to be alderman of the said ward, having been adjudged not to be a fit and proper person to support the dignity and discharge the duties of the said place or office; at which court of wardmote divers persons, being then present, voted for *Scales* as alderman, and he, by reason thereof, claimed to be duly elected into the said office, and a return to the said precept was afterwards, on the 3d of *January* in the year of our Lord 1832, made into the said court of mayor and aldermen then duly holden in the *Guildhall* of the said city, according to the said custom, stating to the said court, that so far as the majority of votes or polls was concerned, the said *M. Scales* was elected alderman of the said ward.

The return then, after stating the petition of several freemen against the admission of *Scales*, in nearly the same terms as in the affidavit against the rule, proceeded as follows:—

“Whereupon the said court of mayor and aldermen, being then and there duly holden in the *Guildhall* of the said city, according to the said custom, took the said petition into consideration, and having heard the petitioners by themselves and their agents, in the presence and hearing of the said *M. Scales*, and also having

1833.

The King
against
The Lord
Mayor and
Aldermen of
London.

1883.

 BLANET
 against
 HOLT.

in saying that 60*l.* is the amount of the recognizance; the order should probably have been *double the sum sworn to*, because if there was a sum certain mentioned in the recognizance, there would be no ground for Mr. Platt's application, which is made on the ground that there is no sum certain mentioned in the recognizance.

The proceedings against the original defendant were by bill; and it was contended, that as the form of the recognizance is that the bail should pay the condemnation money and costs in general terms, the bail could not be relieved but on payment of the sum sworn to and the whole of the costs; but it was admitted, that if the proceedings had been by original, then, as the bail are bound in a sum certain and which is double the sum mentioned, they would not, in any event, be liable beyond that amount.

In the Common Pleas they are each liable to that extent.

We have no distinct account how the difference arose in the form of the recognizance by bill; it might be connected with the old course of the Court as to bail by bill, which was that they are liable to the full extent of the damages in all the actions that should be brought against them by the same plaintiff, in the same term. And though the entry in the recognizance of bail is "in placito prædicto" only, yet by that entry he seems to have been considered to be subject to all actions in the same term, by the same plaintiff, against the same party, though not at the suit of a stranger. This practice was found productive of so much inconvenience that a rule of *Trinity* term, 22 *Car. 2.*, was made to limit the responsibility of the bail; and by another rule

of

of *Easter*, 5 G. 2., the bail shall be liable for so much as is indorsed on the process, or for any lesser sum which the plaintiff may recover; the last rule itself is silent as to costs; but in a note to the rule of the edition of 1742 (and the notes to that edition are considered authority as to the practice) there is added, "together with costs of suit."

Several cases have occurred since to the same effect, not necessary to notice, up to *Jacob v. Bowes* (a), where what we have just mentioned is stated as the practice as to the sum sworn to, and the extension of the rule as to costs. That, however, was by original; but the Court say there is no difference in practice between the two modes of proceeding. And the question is, what is to be the amount of the costs; whether the whole costs however great, or whether they are to be limited so as that, upon the whole, the bail shall not be liable to more than double the sum sworn to. And we think that it is to be limited so as that the bail shall not be liable to more than double the sum sworn to.

It would be singular that the bail should incur a greater or less degree of liability according as the action was commenced by bill or by original; the bail, if opposed, justify in both cases in double the sum sworn to; and they can never contemplate a different degree of liability in the two cases.

The plaintiff looks for the same sum in each case; and he cannot require that they should justify in a greater sum in one case than the other.

The bail to the sheriff are not liable to more than the penalty of the bail-bond, whether the proceedings be by

1833.

 BLANEY
against
HOLT.
(a) 6 *Eng*, 312.

1853.

BLANKET
against
flood.

bill or by original; their obligation is for the appearance of the defendant, which is not his personal appearance, but putting in and justifying special bail; the liability of these bail ought to be the same as the bail to the sheriff, who undertook to put them in: if the bail to the sheriff themselves become the special bail, it cannot be supposed that they incur a greater liability than that which they contracted to the sheriff.

In *Goss v. Drakeford*, bail of *William Harrison* (a), the reporter's abstract of the case is, "semble, where the bail are let in upon terms to try the cause of the principal, the money levied to abide the event, and the bail-bond to stand as a security, the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security when the bail was first let in to try upon terms."

We think that case rightly decided, and that the abstract of it would be correct even without the intervention of the *semble*: the reason for which *semble* must have been the particular undertaking of the bail; for if an action was brought on the bail-bond itself, the bail could not be liable beyond the amount of the penalty.

We, however, advert to a case of *The Duke of York v. Pilkington* (b) in 34 Car. 2., where it was held that the bail above might be liable to a greater amount than the bail to the sheriff. That might be so according to the ancient practice of the Court—that, in a proceeding by bill, the bail were liable to any extent; but this case does not appear to have been rightly decided, as it was

(a) 2 Smith's Reports, 354.

(b) Skinn. 70.

after the rule of *Trinity*, 22 Car.2., which was, probably, not brought to the attention of the Court.

If the sheriff has to put in special bail, his bail, in the same manner as the bail to the sheriff, relieves him by justifying in double the sum sworn to; and if an attachment be obtained against the sheriff for not bringing in the body, or, in other words, not justifying special bail, he is not liable beyond the penalty of the bail-bond and the costs of the attachment, *The King v. The Sheriff of Middlesex* (a). That, indeed, was a proceeding by original; but the Court, who had taken time to consider, do not put it upon that distinction; and in *Jacob v. Bowes* (b), above cited, the Court said that there was no difference in practice, whether the proceedings were by bill or by original. That was not the same case as the present; but we refer to it as containing the general opinion as to the practice. We do not advert to any cases decided in the Common Pleas, because, there, the bail are bound in a sum certain.

We are therefore of opinion, that no rule should be granted.

This case arises upon an action commenced before Easter term 2 W.4. But the twenty-first of the new rules of Hilary term of that year, and which rules are directed to commence on the first day of Easter term following, directs that bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance; and probably, therefore, a question like the present may never arise again.

Rule, for setting aside the order, refused.

(a) 3 East, 604.

(b) 6 East, 512.

1832.

Blair
against
Holt.

1833.

Tuesday,
June 11th.

The Mayor, Bailiffs, and Burgesses of the
Borough of LEICESTER *against* BURGESS.

The statute
11 G. 4. and
1 W. 4. c. 64.,
for permitting
the general sale
of beer by retail
in England,
does not super-
sede the custom
of a borough,
that no person
shall carry on
the trade of an
alehouse-
keeper therein
who is not a
burgess.

CASE. The declaration stated that the borough of *Leicester* was an ancient borough, in which there had been, from time immemorial, a body corporate known by divers names of incorporation, and that Queen *Elizabeth*, by her letters patent, constituted and created the burgesses of the said borough a body corporate by the name of the mayor, bailiffs, and burgesses of the borough of *Leicester*, and that there is, and from time whereof, &c. hath been, an ancient custom in the said borough, "that no person, not being a burgess, nor the widow of a burgess of the said borough, should carry on the trade of an alehouse-keeper within the limits of the said borough; yet the defendant, well knowing, &c., and not being a burgess of the said borough, nor having any lawful right or excuse in that behalf, but contriving, &c. heretofore, to wit, on the 30th day of *March* 1831, and on other days, &c., carried on the trade of an alehouse-keeper within the limits of the said borough, contrary to the said custom, and against the will of the plaintiffs." The second count stated the custom to be, that no person, not being a burgess, &c., nor a person licensed by the mayor, bailiffs, and burgesses, should carry on the said trade within the borough. There were other counts, stating the custom with some variations, and charging the defendant with selling ale and beer by retail within the borough, and occupying a house, and trading for that

that purpose within the borough, contrary to the custom.

1833.

The Mayor of
LEICESTER
against
BURGESS.

Pleas, 1. Not guilty. 2. That after the 10th day of *October*, in the year of our Lord 1830, mentioned in a certain act of parliament made, &c. (1 W. 4.), entitled "An Act to permit the general sale of Beer and Cyder by retail in *England*," and before either of the said times when, &c. in the declaration mentioned, that is to say, on, &c., the defendant, then and there being a householder, holding and occupying the said house in the said declaration mentioned to have been occupied by the said defendant, and being then and there assessed to the poor-rates in the said parish in which the said house was situated, and in which he, the said defendant, was licensed to sell beer by retail, as hereinafter mentioned, and not then and there being a sheriff's officer, or officer executing the legal process of any court of justice, under or by virtue and in pursuance of the provisions of the said last-mentioned act of parliament, duly applied for and obtained from certain persons, to wit, *John Tanfield* and *Gervase Ford*, the said *G. F.*, then and there being supervisor of excise, and the said *J. T.* then and there being collector of excise for the district and collection within which the house after-mentioned was and is situate, a licence under the hands and seals of the said *J. T.* and *G. F.*, to sell beer, ale and porter by retail in the said district, in a certain house and premises specified in the said licence, being a house and premises situate within the limits of the said borough and district and collection, and being the said house in the said declaration and in this plea mentioned to have been occupied by the said defendant, the said district, collection, and borough not being within

1833.

—
 The Mayor of
 LITCHFIELD
 against
 BURTON.

within the limits of the chief office of excise in *London*; and that before and at the said times when, &c. the said licence was and still is in full force and effect, and that at the said times when, &c. he, the said defendant, by virtue of the said licence, did sell beer, ale, and porter by retail in the said house, but not elsewhere in the said borough; and for that purpose, and in so doing, but not otherwise or elsewhere, did carry on the said trade of an alehouse-keeper and victualler, and then and there occupied the said house for the purpose of selling beer, ale, and porter by retail therein, and therein carried on the said trade of selling beer, ale, and porter as the defendant lawfully might for the cause aforesaid. — 3. As to selling ale and beer by retail, and occupying a house, and trading for that purpose, within the borough: That the defendant at the said times when, &c. sold ale and beer within the said borough, and for that purpose occupied a house and traded within the said borough, to wit, in a certain house situate therein, under and by virtue of a certain licence before then, to wit, on the said 29th day of *October*, &c., duly obtained by him for that purpose under the provisions of the said act of parliament, &c., the said last-mentioned house being specified in the last-mentioned licence in that behalf, and such licence being at the said times when, &c. in full force. General demurrer to the second and third pleas. Joinder. The demurrer was now argued by

Amos for the plaintiffs. The local custom is not superseded by the act 11 G. 4. and 1 W. 4. c. 64. The preamble of that statute only recites, that it is expedient to give greater facilities for the sale of beer "than are

at

at present afforded by licenses to keepers of inns," &c. If the intention had been to relax the customs of particular towns and corporations, the legislature would have expressed it by a recital to that effect, as is done, for example, in 3 G. 3. c. 8. s. 1. (a): but the first section of the present act, which makes it lawful for any person licensed as therein is mentioned to sell beer, &c. by retail in any part of *England*, in any house or premises specified in such license, concludes, "any thing in any act or acts heretofore made, or in force at the time of the passing of this act, to the contrary notwithstanding;" not mentioning customs. Affirmative words in an act do not take away a former custom, *Co. Litt.* 115. a. *Com. Dig. Parliament*, (R) 24. And without supposing such a relaxation as will be contended for on the other side, this statute does afford much greater facilities for the carrying on of the beer trade in cities and elsewhere than were before enjoyed. In *Simson v. Moss* (b), it was held that a hawker's license, under the statute 50 G. 3. c. 41., did not give the privilege of selling goods in a borough where, by custom and by-law, strangers were forbidden to trade. There is no reason for contending that beer licenses, under the present act, have a more extensive effect. No intention appears, either in the act 11 G. 4. and 1 W. 4. c. 64., or in 9 G. 4. c. 61., which consolidates the previous statutes, to give this peculiar advantage to the trade in beer.

1833.

The Mayor of
Lancaster
against
Burgess.

The *Solicitor-General* contra. Looking at the whole statute 11 G. 4. and 1 W. 4. c. 64., it is plain the le-

(a) Enabling persons who have been in the land or sea service since the 29th of November 1748, to exercise trades.

(b) 2 B. & Ad. 543.

1833.

The Mayor of
LEICESTER
against
BURGESS.

gislature intended to take away restrictive local customs as to the beer trade. Sect. 1. enables the persons licensed under this act to sell in any part of *England*, in any house specified in such license. Sect. 2. makes it lawful for every and any person, being a householder (except such persons as are after specially excepted), to obtain a license for that purpose; and the exception is, "that no such license shall be granted to any person being a sheriff's officer, or officer executing the legal process of any court of justice, nor to any person, not being a householder assessed to the poor rates in the parish or place in which he shall be licensed to sell." The Court will not engraft other exceptions on these, nor introduce the qualification that the party shall, in particular places, be a freeman. The act is entitled, "An Act to permit the general Sale of Beer and Cyder by Retail in *England*." The title may be referred to in construing a statute: that of 27 G. 3. c. 44. was relied upon in argument on both sides, in *Free v. Burgoyne* (a), and was also referred to by the Lord Chancellor in the same case before the House of Lords (b). The preamble, here, is not confined by the terms used to mere defects in the system of licenses; and, if it were, it would not necessarily restrain the enacting clauses. *Rex v. Pierce* (c). The preamble is only to be referred to for elucidation where the clauses are not sufficiently explained aliunde. The twenty-ninth section saves the rights and privileges of the Universities of *Oxford* and *Cambridge*, and the powers and authorities vested by charter or otherwise in the chancellors, masters, and scholars of the said Universities, and their

(a) 5 B. & C. 400.

(b) 2 Bligh's Rep. 78. N. S.

(c) 3 M. & S. 62.

successors; or in the master, wardens, freemen, and commonalty of the vintners of the city of *London*. These reservations, according to the argument for the plaintiffs, would be needless; but they shew that, without such a reservation, the effect of the statute would have been to supersede those particular rights. The rule is, that, where general words are followed by words of exception, "all that is not within the particular shall be within the general." *Lord Zouch v. Moor (a), Wiltshire v. James (b)*. The policy of this act was to extend the trade in beer, and open it generally to all such householders as are there mentioned, who could give the required sureties. *Simson v. Moss (c)* was decided on slight consideration, and differs from the present case, inasmuch as that turned upon a restraining, this on an enabling statute.

1833.

—
The Mayor of
Lancaster
against
Burgess.

Anos, in reply. Section 29. does not refer to the customs of cities and boroughs; and it is borrowed from the thirty-sixth section of 9 G. 4. c. 61., which clearly was not intended to abrogate any local customs. As to the title of the present act, the title is no part of a statute, according to many authorities, cited in 2 *Darrris on Statutes*, 653.; and, if it were so, in this case it is favourable to the plaintiffs. The words "in any part of *England*" have reference merely to the limited operation of the statute, which extends to *England* only; and the exceptions in sect. 2. are only restrictions upon the power previously given of taking out licenses in places where they might have been granted before the act.

(a) 2 *Roll. Rep.* 280. 14 *Fin. Abr. Grants*, H. 13. pl. 61.

(b) *Dyer*, 58. b.

(c) 2 *B. & Ad.* 545.

1833.

The Mayor
of
Leicester
against
Burgess.

DENMAN C. J. I must say that, on looking to the general language used in this act, the words "in any part of *England*," and the twenty-ninth section, it struck me, at first, that the privilege given by the statute extended to all places but those excepted. But, on further consideration, both of the general purport of the act, and of the first, which is the operating clause, I am of opinion it cannot apply to places where, by local custom, the trade is restricted. It is true the second section empowers any person (with the exceptions there mentioned) to apply for and obtain a license; but, by the preceding section, that license only gives power to sell, any thing "in any act or acts" of parliament to the contrary notwithstanding: it does not supersede customs. The twenty-ninth section does not relate to exclusive rights of selling, as exercised in particular places, but to the power of licensing which existed in certain jurisdictions, and which is preserved to them, although the like powers are abolished elsewhere.

LITLEDALE J. The words of this statute, in the clause enabling parties to take out licenses, are, "any thing in any act or acts heretofore made, or in force at the time of the passing of this act, to the contrary in anywise notwithstanding:" there is no reference to local customs; where, therefore, such existed, this clause does not alter them. The act does nothing more in this respect than was done by former statutes: it only gives greater facilities in the case of persons not precluded by local custom from obtaining licenses. The second section, with the exceptions there laid down, is only a continuation of the first. As to the twenty-ninth, its object is only that the Universities and the

Vintners'

Vintners' Company should retain the privileges they before enjoyed, in regulating licenses within their respective jurisdictions. A distinction has been taken between this case and *Simson v. Moss*(a), because that arose upon a restraining statute; but there is nothing to shew that the present act was meant to have an enabling operation as to selling in particular places.

1833.

The Mayor of
LEICESTER
against
BURGESS.

PARKE J. I have had a strong opinion on this case from the first. Looking both to the preamble and the body of the act, I think the defendant's pleas cannot be supported. The preamble states, that "it is expedient for the better supplying the public with beer in *England*, to give greater facilities for the sale thereof than are at present afforded by licenses to keepers of inns, alehouses, and victualling-houses;" and then the enacting part of the section makes it lawful for any and every person who shall obtain a license for that purpose under the act, to sell beer by retail in any part of *England*, in any house specified in such license, "any act or acts heretofore made to the contrary notwithstanding." That shews that the restriction which the legislature meant to take away was the parliamentary restriction imposed by former statutes; and this is consistent with the preamble and the title. The powers of the Universities and of the Vintners' Company, mentioned in the twenty-ninth section, are merely the jurisdiction, and privilege of licensing enjoyed by those bodies: they are not powers of the same kind as the right of exclusively selling, which exists by custom in certain boroughs.

(a) 2 B. & Ad. 545.

1833.

The Mayor of
Lichester
against
Burgess.

PATTESON J. I am of the same opinion. It appears to me that this statute has nothing to do with the customs of particular places. If it had been intended to take away these customs, they might have been expressly noticed. The powers saved by sect. 29. are of a different nature. The first section enables any person licensed under the act to sell beer by retail in any part of *England*, in any house or premises specified in such license. The argument for the defendant would go the length of shewing, that a covenant in a lease not to sell beer on the premises, would be superseded by the statute.

Judgment for the plaintiffs.

The KING *against* Dame JANE ST. JOHN MILD-
MAY, Lady of the Manor of MARWELL, in the
County of SOUTHAMPTON, and WILLIAM BRAY,
Esquire, her Steward of the said Manor.

A copyholder
in fee sur-
rendered to the
use of another
person, and
afterwards, and
before the
admittance of
the surrenderee,
committed and
was convicted
of simple
felony: there
being a custom
in the manor
that any tenant
of customary
tenements, who
should commit
and be convicted
of felony, should
forfeit his said
tenements to the
lord. Held, that
the surrenderee,
before admittance,
was still tenant
for the purpose
of forfeiture; and
that his estate
was forfeited to
the lord, and the
surrenderee not
entitled to be
admitted.

MANDAMUS, reciting that the manor of *Marvell*,
from time immemorial, had been an ancient
manor, within which there were various copyhold te-
nements granted by and held of the lord or lady of the
manor, according to the custom of the manor, and
demised and demiseable by copy of court roll, accord-
ing to the custom of the manor, and that the lord or
lady, and the steward for the time being, held customary
courts for the manor, and accepted, and of right ought
to accept, all such surrenders of any of the said custom-

ary

ary tenements as have been and are duly tendered for acceptance, according to the custom ; and also of right ought to make re-grants of, and admittance to, such customary tenements as have been surrendered for that purpose, to persons entitled thereto, and to such intents as they might have required, and may require, according to the custom. It then stated that *John Boyes*, on or about the 4th of *August* 1830, then being one of the copyhold and customary tenants in fee of certain tenements of the manor according to the custom, did duly make a surrender in fee of the said tenements into the hands of the lady of the manor, to the use and behoof of *H. Southwell* and his heirs for ever, according to the custom of the manor, upon condition that, if *Boyes* should pay to *Southwell* the full sum of 500*l.* with $4\frac{1}{2}$ per cent. interest on the 4th of *February* then next, the surrender was to be void ; that the surrender was taken out of court by the deputy steward, and duly enrolled at the next general court holden on the 26th of *October* 1830, and that *Boyes* did not pay to *Southwell* the sum of 500*l.* with interest, by reason whereof the same surrender remained in full force, and *Southwell* was entitled in pursuance thereof to be admitted as tenant in fee of the premises mentioned in the surrender ; that application had been made to the defendants by *Southwell* to admit him, and that the defendants refused. It then commanded the defendants to admit him. The defendants by their return conceded generally the right of admission as stated in the mandamus, but alleged an immemorial custom within the manor “ that, if any customary tenant of the said manor holding customary tenements in fee or otherwise, parcel of the manor, at the will of the lord or lady of

1839.

The King
against
Lady Jane
St. John
Mildmay.

1833.

—
 The King
 against
 Lady Jane
 St. John
 Mildmay.

the said manor, according to the custom of the manor, *should commit felony, and should be convicted thereof, he should forfeit his said customary tenements within the said manor to the use and benefit of the lord or lady of the said manor for the time being, and his or her heirs or successors for ever*; that *Boyes* on the 4th of August 1830 duly made the surrender, and the same was presented; that *after* the said surrender and presentment thereof, *Boyes* committed and was convicted of felony, which conviction remained of record, and was not since reversed or set aside." It then set out the record of the conviction for feloniously stealing, taking and carrying away five sovereigns, and that the judgment of the Court was, that *Boyes* should be transported for seven years; that by reason of the commission of the felony aforesaid, and of the said conviction, the said copyhold tenements *had escheated* to the lady of the manor according to the custom, and, therefore, she seized into her hands the same, and could not admit *Southwell* to the same, as by the writ she was commanded. A rule nisi was obtained for quashing this return as insufficient, and for issuing a peremptory mandamus. The Court ordered the case to be set down in the special paper for argument, and it was argued (*a*) in last *Hilary* term by

Dampier, for the crown. The lord cannot take advantage of a forfeiture between surrender and admittance, and a peremptory mandamus ought to issue. The surrenderor was possessed of an estate in fee. The return admits that the surrender was enrolled regularly,

(a) Before *Littledale*, *Taunton*, and *Patteson* J.

and

and made for valuable consideration. It was irrevocable by the surrenderor: it was an actual conveyance of the property, not a mere agreement to convey: and, that being so, the surrenderee, who was always ready to be admitted, has a right to call on the lord to perfect the conveyance. The lord's claim to forfeiture accrued after the surrender, by escheat. No case is to be found of an escheat intermediate between surrender and admittance. There is one case, however, which may direct the Court. Suppose a testator, seised in fee, surrenders to the use of his will: he dies without heirs, and with a will. The lord must admit the appointee. He cannot set up the escheat intermediate by the death of the tenant without heirs. It is true that, in that case, he might again surrender the estate in fee, if he chose, and it would pass by such surrender: *Fitch v. Hockley* (a), *Southcote v. Adams* (b). The testator, in this supposed case, having surrendered *to the use of his will*, might, during his life, forfeit or re-surrender: the reason is, because the cestui que use is unknown; but, as soon as he is known, his right to admission enures, and cannot be defeated by escheat. The knowledge and the valuable consideration of and by the cestui que use are important. In the present case, at the time of the surrender, both existed. The appointee's claim is weaker than the cestui que use's; for to the former is required a will and an admittance; to the latter only admittance. It is necessary, in the absence of all precedents as to copyholds, to refer to analogous cases as to freeholds. A devise, though it takes effect

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

(a) *Cro. Eliz.* 442. 4 *Rep.* 23 a.(b) 1 *Roll. Rep.* 256.

after

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

after the testator's death, will prevent an escheat (a). In *Goodcheap's* case (b), a feme covert, seised of lands in London, devised them to be sold by her executors, and died without heirs; and the question was, if the land should escheat, or if the executors might sell. But it seems the executors might sell, *for the land is bound by this devise, and cannot escheat*. There, the testatrix dying without heirs, the king, as lord, would have taken by escheat, had not the vendee of the executor taken by a species of relation; for an immediate devise has a sufficient inception in the lifetime of the testator to prevent an escheat. Thus, in 31 H. 8. 45. b., it is said, if a man devise land to another, and die without heir, the land will not escheat, because the devise prevents the escheat by inception in his life. (c) So the judgment in this case ought to be against the lord, on the ground of relation, which has a very wide operation in cases of copyhold. The admittance relates to the surrender, and the surrenderee's title begins from the date of it. Several instances of relation are put in a note to *Grantham v. Copley* (d). One is from *Co. Litt.* 59. b. :—"If two joint tenants be of copyhold lands in fee, and the one out of court, according to the custom, surrender his part to the lord's hands to the use of his last will, and by his will deviseth his part to a stranger in fee, and dieth, and at the next court the surrender is presented, by the surrender and presentment the jointure was severed, and the devisee ought to be admitted to the moiety of the lands; for

(a) *Co. Litt.* 236. a., n. (1); and see 3 *Cruise Dig.* 456.

(b) 49 *Ed.* 3. fo. 16. abridged in *Brooke's Abr.* tit. *Devise*, pl. 10.

(c) Cited in 1 *Rolle*, 214.

(d) 2 *Saund.* 422. c., n. 2.

now by relation the state of the land was bound by the surrender." After the surrenderee has been admitted, he may lay his demise in ejectment to recover the copyhold premises, on the day of the surrender, or any day between that and the admittance; *Holdfast v. Clapham* (a). *Carr v. Singer* (b) shews that, where there is no custom prescribing the mode of barring an entail of copyhold, it may be barred by surrender to the use of a will. In that case, *Willes C. J.* says,—“When there is a will and admittance, that has a retrospect to the surrender *to all intents*, and it is therefore a bar from the time of the surrender, not from the death of the testator.” But it will be said, that the doctrine of relation applies only as between the parties, or those claiming under them, and that here the lord is a stranger to the surrenderor, and as he claims an interest, and is not merely an instrument of conveyance, he is not barred. First, it is a universal rule, in all conveyances where there are several times and acts, that there should be a relation of all the subordinate parts to the most essential part. Secondly, a joint tenant, by whose surrender the right of survivor is barred, *Co. Litt.* 59. b., and an issue in tail, whose estate is barred, *Carr v. Singer* (b), are strangers to the surrenderor. Thirdly, the lord did not at one time (*i. e.* before the forfeiture) claim an interest, the interest was then in the surrenderee: *Vaughan v. Atkins* (c), and one who has undertaken to hold as depositary to the use of the surrenderee, cannot afterwards claim in interest. The lord was only an instrument, and no change of circumstances could divest him of that character, though it might cause an alteration in the convey-

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

(a) 1 T. R. 600.

(b) 2 Ves. sen. 603.

(c) 5 Burr. 2764.

ance.

1833.

—
The KING
against
Lady JANE
ST. JOHN
MILDMAY.

ance (a). The words of *Ashurst J.* in *Holdfast v. Clapham* (b), will be cited to shew that it is only “as against all persons but the lord, that the title of the surrenderee, after admittance, is perfect *as from the time of the surrender*, and shall relate back to it.” But that is a mere obiter dictum, and no authority is cited in support of it; and the report in that respect may probably be incorrect. A MS. note of this part of the judgment by Mr. (afterwards C. J.) *Gibbs*, is as follows:—“An ejectment may be maintained even without admittance, for the title is good against every one but the lord: admittance is required for his sake.” That passage can only apply to an heir, for he only, before admittance, can maintain ejectment. It is clear the case of an heir and not of a surrenderee was spoken of by the learned Judge: it is, at best, a mere obiter dictum, but it is more probably an inaccuracy of the reporter. But the case put, of surrender to the use of the will when the testator dies without heirs, is an instance where even the title of the surrenderee is good against the lord. So is *Goodcheap’s* case (c), which is one of freehold, and is therefore a case *à fortiori*: for a freehold is not so easily divested and transposed; but an estate at will is a creature of the will, and is not necessarily conveyed by external symbols. It may be said that, as the lord is not benefited by the surrenderee’s escheat, according to *Roe d. Jeffery v. Hicks* (d), he must be benefited by the surrenderor’s, else he would have no *forfeiting* tenant. But the answer to that is given by the Master of the Rolls in *Burgess v. Wheate* (e):—“It is not every argument in

(a) *Litt.* § 352.

(b) 1 T. R. 630.

(c) 49 *Ed.* 3. fol. 16.(d) 2 *Wils.* 13.(e) 1 *W. Blackst.* 144.

law or logic that holds *à converso*. There should be a reciprocal right to have a reciprocal equity." The right of the lord is to have a *serviceable* tenant, either by substitution or continuance. Thus, if a mortgagor dies without heirs, the lord cannot redeem (*a*); if the mortgagee die without heirs, the mortgagor may redeem and enter against the lord; *Pawlett v. The Attorney-General* (*b*). If disseisor die without heirs, the disseisee may enter against the lord who has entered for the disseisor's escheat (*c*); if the disseisee die without heirs, the lord will not take if the tenant have title (*d*). If a vendee die without heirs before conveyance, the lord takes nothing; if the vendor die, the lord must make a title to the vendee, and must hold the purchase money as trustee for the vendor's personal representative, *Burgess v. Wheate* (*e*). It has been said that a lord *pro tempore* might admit in fee, because it was for the succeeding lord's benefit that he should have a tenant, in respect of the service to be rendered (*g*). The reciprocity is, not to have a *forfeiting* tenant, but a tenant to do the service. There are many cases where the lord will not have a *forfeiting* tenant. An heir before admittance cannot forfeit; if so, the lord has there no *forfeiting* tenant. If the surrenderee on condition be admitted, and forfeits, the surrenderor can claim against the lord on performance of the condition; if so, the lord has no *forfeiting* tenant. Between the death of a testator without heirs and admittance of appointee, there is no *forfeiting* tenant. But, conceding the argument from reciprocity, then because alienation and

1833.

—
The King
against
Lady Jane
St. John
Mildmay.

(a) *Co. Litt.* 206. a.(c) *Co. Litt.* 268. b.(e) 1 *W. Black.* 150.(b) *Hard.* 465.(d) *Co. Litt.* 268. b.(g) *Gilbert's Tenures*, 205.

escheat

1833.

—
 The KING
 against
 Lady JANE
 ST. JOHN
 MILD MAY.

escheat are convertible terms, and he who can alienate can cause escheat, and vice versâ, as here the surrenderor could not alienate, he cannot cause escheat. Again, by forfeiture for felony, all estates made after the felony are avoided (a). Here a surrender *after* the felony would have been bad; consequently, by reciprocity, a surrender *before* the felony must be good.

A surrender is an alienation: it is at least a charge, and more than a possibility. But possibilities and contingencies bind freehold estates in the hands of the lord claiming by escheat, *Nichols v. Nichols* (b). Lease for life conditioned that lessee should have a fee if lessor should die without issue. Lessor being attainted of treason by act of parliament, whereby all his lands were forfeited, died without issue: and it was adjudged that the lessee had the fee against the crown; "for the lessor's escheat, nor any cause whatever, shall prejudice the lessee; but when the condition is performed, the fee vests in the lessee, discharged of all incumbrances made by the lessor, or under felony or treason done by him." (c) Lord Coke says of a lease for life conditioned to have fee, that the fee passes not before the performance of the condition; and he adds afterwards, "This enures as an executory grant." (d) But *Plowden*, 486, 487. of the case before cited, says, "The condition is an agreement real, with which the land is charged, into whatsoever hands it comes," so that no act between the grant and the day shall prejudice the lessee. No fee passed, yet it was bound. In *Co. Litt.* 218. a. it is said, "If the condition be

(a) *Co. Litt.* 390. b.(b) *Plowd.* 481.(c) *Plowd.* 486.(d) *Co. Litt.* 217. b.

to increase an estate, that is to say, (that the lessee is) to have fee upon payment of money to the lessor or his heirs at a certain day, and before the day the lessor is attainted of treason or felony, *and also before the day is executed*, now is the condition become impossible by the act and offence of the lessor; and yet the lessee shall not have fee, because a precedent condition to increase an estate must be performed, and, if it become impossible, no estate shall arise." The execution of the attainted person, there, was the only reason why it became impossible to perform the condition; payment to the attainted person before execution would have taken the fee from the lord by relation, for an attainted person is not, to all purposes, dead in law. It will be said, that *Pawlett v. The Attorney-General* (a) shews merely that the surrenderor or mortgagor may redeem against the lord who takes on escheat of the admitted surrenderee; but it proves also, that, where a perfect tenant forfeits, the lord shall not retain: why then should he retain on forfeiture of a tenant who has surrendered, who, when he surrendered, had full dominion over the estate? *Giles v. Grover* (b). Such a person may so affect it, that, into whatsoever hands it comes by forfeiture, it shall be bound; *Walsingham's case* (c). The lord, by escheat, is assignee and privy in law (d). He takes, therefore, subject to lien. The estate or the land is bound. *Co. Litt.* 338. b. shews that, in certain cases, although as between two parties, the estate of a surrenderor may have vanished, yet, as to a third person,

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

(a) *Hardr.* 465.(b) 9 *Bing.* 139. 161.(c) *Plowd.* 559.(d) *Co. Litt.* 215. b. 352. a.

1833.

The King
against
Lady JANE
St. JOHN
MILDMAY.

it shall remain. The estate may be freed from a trust, but not from a charge; *Walsingham's* case (a). Even if the estate be gone, still the land is charged (b), and the lord cannot retain it.

Assuming that the doctrine of relation does not apply in this case, still the lord may be bound; for it may be contended that the lord is owner in demesne, so that the custom does not apply. The surrenderor after surrender is not tenant to every intent; he continues tenant merely for preservation of the tenancy, and not to cause escheat (c). In *Co. Lit.* 62. a., it is said, "By surrender out of court the *copyhold estate passes to the lord* under a secret condition that it be presented at the next court according to the custom of the manor;" and in *Co. Copyholder*, s. 39. it is said, "Till admittance, the lord takes notice of the grantor as tenant;" not that he is really tenant. "The interest is in him but *secundum quid*, and not absolutely. The grantee cannot be deluded of the effects of his surrender." In *Rex v. Boughey* (d), *Holroyd J.* says, that, "until admittance, the estate is not completely taken out of the surrenderor." But he who forfeits must not be simply *secundum quid* a tenant: the estate must be completely in him, forfeiture being *strictissimi juris*. In early times both surrender and admittance were real conveyances. Surrender was one conveyance, admittance of the party recommended by the surrenderor was another. The admittance then was of grace and favour, now it is of right (e); and when custom had bound the lord to admit, both were parts of one conveyance; the latter formal and governed

(a) *Plowd.* 559.(b) *Litt. s.* 289. *Co. Litt.* 349. a.(c) *Co. Litt.* 62. a. 4 *Co.* 23. a. (d) 1 *B. & C.* 573.(e) 2 *Wils.* 401.

by the former, which is the essential part. In the one view, "the surrenderee is in by grant of the lord," *Rigden v. Vallier* (a), *Crouther v. Oldfield* (b), and so is the title pleaded. And in that view the lord must be considered as in by the surrender. In the other, relation must operate. But suppose the cestui qui use did not seek admittance. The lord had no right to or wish for the land; he required a *serviceable* tenant. Hence the surrenderor, being the lord's villain, must by the lord's will have continued tenant. But the will of the lord so continuing him tenant ought not to operate against the cestui qui use for the purpose of forfeiture; for "the estate is really in the lord, though the surrenderor shall have the profits:" *Allen v. Nash* (c), *Rigden v. Vallier* (a). It is said in *Taverner v. Cromwell* (d) that the party admitted is in by the surrenderor, but that has reference to the proposition which follows, that the lord cannot affect the estate with any charges in its transit through him.

The surrenderor has an usufruct to allow him to perform service, but to give him more would prejudice the lord, for by escheat the service is destroyed. "Tenancy is the fruit; escheat is the tree itself." (*Spelman*.) After surrender he remains tenant by fiction, to preserve the tenancy, but not so that, by fiction, the tenancy may be destroyed. Tenancies are often for certain and not all purposes. *Bulter* and *Baker's* case (e).

This forfeiture is by custom, and which to be valid must have commenced before the time of legal memory. The lord had full power over the estate before the

1833.

—
The KING
against
Lady JANE
ST. JOHN
MILDMAN.

(a) 3 Ves. sen. 257.

(b) 1 Salk. 365.

(c) Noy. 152.

(d) 4 Rep. 27 a.

(e) 3 Co. 29 b. See *Plowd.* 486. *Co. Litt.* 2 b.

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

tenant had gained an estate according to the custom, for otherwise the lord could not have imposed the condition now relied upon, it being solely for his benefit. But at that time a surrender was an actual conveyance of the estate to the lord, and he actually regranted the estate by admittance. The surrenderor was no tenant after the surrender and before admittance. His felony, therefore, could not have been contemplated by the custom; he could not forfeit to the lord what the lord had already. The felony contemplated was that of the then actual tenants, those unaffected by surrender. The custom now, no more than then, applies; it is a private custom, it causes forfeiture, and is to be strictly construed. A grant of consuance does not include subsequently created actions (a). So grant of consuance within a manor, gives none over land subsequently escheated (b).

It may be said that the lord will be defrauded if the estate be neither in the surrenderor nor the surrenderee for the purpose of forfeiture, for by universal practice the mortgagee is never admitted. Now, if such be the practice, the argument *primæ impressionis* becomes the stronger, for some case ought to have been found which would be an authority on the other side. It is enough, however, to say that the mortgagee would be defrauded if the surrenderor did forfeit, for he would lose his pledge, the lord only shifts his tenant. Fraud must be alleged; it will not be presumed in a case of *mandamus*. The lord will lose no fruit of tenure, he is triply secured, by the continuing tenancy of the surrenderor,

(a) 14 H. 4., 20. See also 4 Inst. 205. *Davis's Rep.* 63 a. *Bro. Abr.* "Consuance," pl. 56.

(b) *Plowd.* 130.

relation of admittance, and necessity of admittance. Admittance is either sought for or not. If it be sought for, no question arises. If it be not sought for, the surrenderor's interest is gone, and the lord may proclaim and seize quousque, &c. In case of a surrender to will and no heir, the lord seizes till the appointee comes in.

It will also be objected, that the surrenderor may forfeit by waste, which is a real mischief to the lord. But that is remote, and will not be presumed. An admitted surrenderee in mortgage might so forfeit, but the surrenderor might redeem.

A surrender in these times is a conveyance to the lord. If not, why insist on admittance by the lord? Hence a man may convey to his wife and to future uses. A surrender is different from a grant at common law, because, in a grant, nothing can pass if the grantee be non-existing (*a*). But a surrenderee may be non-existing, therefore by surrender something does pass: "no more passeth to the lord but to serve the limitation" (*b*). A surrender to the lord operates by transmutation (*c*). It resembles a feoffment to uses. If the uses be future, the feoffor has a right to the profits, and must therefore do the services (*d*); but he is not tenant to cause escheat, though he is tenant to serve on juries. Because he takes the profits, he is bound to do the services; not because he is simply a tenant to the lord, for the feoffee is tenant.

It may be said, that on a covenant to stand seised to future uses, the lord shall take on the covenantor's escheat. But that is doubtful; *Broke's Abr.* tit. "*Feoffment to*

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

(*a*) *Co. Copyhr.* s. 41.(*b*) *Co. Litt.* 59 b.(*c*) *See Co. Litt.* 271 b.(*d*) *Litt.* s. 462.

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

Uses," pl. 50., is contra; and again, the covenantor is simply tenant: there is no conveyance, only a covenant which equity will not enforce against the lord. *Burgaine v. Spurling* (a), which seems contrary, may be so explained, for in that case there was a surrender out of court, on condition to be void on repayment, &c.; before presentment or repayment there was a second surrender, then repayment, then a third surrender. The second surrender was held good, "for the estate was not out of the surrenderor by the first surrender." Now in that case it must be observed that the contest was between the second and third surrenderees; the surrenderor would be bound by the second surrender, and the third surrenderee claiming under him would be also bound. But suppose there had been no repayment, could the second or third surrenderee, or the lord by escheat, have taken against the first surrenderee? Lord *Hale* (b), speaking of this case, says, "the interest is bound by the first surrender, though the estate does not pass till presentment." So that the want of presentment, not of admittance, was the ground of the decision. It appears not only from what *Hale* says, but from the report in *Croke*, that if the first surrender had been duly presented, that would have bound the land. That case, therefore, is nothing more than a mortgage without delivery of title deeds, and a second mortgage with delivery, or a sale without register, and a second sale with register, the second conveyance being *bonâ fide*.

It may be objected that a surrender is, in the books, likened to a feoffment within the view without livery

(a) *Cro. Car.* 273. 285.(b) *Co. Litt.* 62. a. note 411.

where

where nothing passes till the entry (a); but it may be answered, that a feoffment with livery is so peculiar that no conveyance is like it, not even a fine, though it acknowledges a previous feoffment. And that objection proves too much. The feoffor's heir (there being no entry) takes unbound; not so the surrenderor's heir. The feoffee's heir in like case takes nothing. The unadmitted surrenderee's heir will take by descent. Besides, as against feoffor and those claiming by his act, the feoffment within view has operation, an interest passes which cannot be countermanded: *Parsons v. Perus* (b). It may also be argued, that the lord after escheat would be bound on the death of such feoffor without heir, for it is an inchoate conveyance. So an equitable mortgage is good against the crown: *Casberd v. Ward* (c). So the lord is bound in the case before referred to from *Burgess v. Wheate* (d). In a surrender the lord is privy, the surrenderee has a right for which he has given valuable consideration, a conveyance is in progress, the part gone by is binding, the future is certain, therefore the lord is bound: *Rector of Chedington's case* (e).

The return may be set aside on another ground. The enrolment of the surrender binds the lord; and, as said in *Sir W. Black. 167.*, "If the lord consent to a condition or trust on the court roll, he is bound by it." Tenant for life of a copyhold suffers a recovery in fee in the lord's court, there is no forfeiture, for the lord is a party. *Keen v. Kirby* (g). Could Lady Mildmay have taken a second surrender to herself from

1833.

The King
against
Lady Jane
St. John
Mildmay.

(a) *Co. Lit.* 49 b.(c) 6 *Price*, 411.(e) 1 *Co.* 155. b.(b) 1 *Vent.* 186.(d) 1 *W. Bl.* 150.(g) 1 *Mod.* 199.

1833.

—
The King
against
Lady JANE
St. JOHN
MILDMAY.

Boyes? No, because she was privy to the first. If privy in one case she is so in all. She knows and has acknowledged the condition, and cannot now set up a claim of interest.

There are two cases which appear adverse to this application; *Doe v. Wroot* (a) shews that till admittance of the surrenderee of a copyhold upon mortgage, the surrenderor continues the legal tenant, and cannot devise the equity of redemption even after the surrender made, without a new surrender to the use of his will. Undoubtedly, between him and the lord, he continues tenant for the purpose of service. But there is another answer. On repayment of the mortgage debt, satisfaction is entered on the roll, and the mortgagor is not re-admitted. If he before repayment were not obliged to surrender to the use of the will, the appointee would claim admittance where there was no surrender to the use of the will, which would be absurd. Besides, what has been said of *Burgaine v. Spurling* (b) applies to *Doe v. Wroot* in principle. The other case is *Peachy v. The Duke of Somerset* (c): tenant of inheritance of copyhold surrendered in strict settlement; he having an infant son committed forfeiture; there was no admittance on the surrender, and Lord *Macclesfield* thought the whole inheritance was forfeited. His opinion, however, was obiter, the infant's case was not before the Court. The grounds of the Chancellor's opinion are from the forfeiting and escheating of trustees at common law, and from the necessity of the lord having a forfeiting tenant. But trustees at common law are very tenants; and it seems

(a) 5 *East*, 138.(b) *Cro. Car.* 273. 283.(c) 1 *Str.* 447. *Proc. in Chanc.* 568.

from what has been said, that a *forfeiting* tenant is not necessary in freeholds, much less in copyholds.

For these reasons the return is no answer, and a peremptory mandamus must go.

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

Phillip Williams contra. The question in this case depends upon two points: first, could *Boyes's* conviction have created a forfeiture if he had not made the surrender? and, secondly, does the surrender to *Southwell* prevent the forfeiture before his admission; in other words, was *Southwell* or *Boyes* the tenant at the time when the forfeiture accrued?

As to the first point, it is clear, the custom being uncontradicted, that *Boyes's* conviction would have created a forfeiture if he had not made the surrender.

As to the second point, the several authorities cited on the other side as to the doctrine of relation only shew that that doctrine applies as between the parties to the surrender, and that the effect of it is, as between them, that the surrenderee's title begins from the date of it; but they do not in any degree establish that the surrenderee has any title as against the lord before admittance; and if he has not, it follows, that if the surrenderor, who still continues the lord's tenant, before the admittance of the surrenderee commits felony, the land escheats to the lord. The surrender does not vest any thing in the lord in any case, but where the surrender is absolute without the expression of any use or condition, and then only when no other intention can be collected. The surrenderor is trustee for the surrenderee, and the trust lives are all that the lord will look to. There are numerous authorities to shew that the surrenderor continues tenant till the admittance of the surrenderee. In

1833.

The KING
against
Lady JANE
ST. JOHN
MILDMAY.

Berry v. Greene (a), a copyholder surrendered to the use of J. S.: the lord without reasonable cause refused to admit him. The question was, if he might enter without admittance? The Court held that he could not, for after the surrender, and before admittance, he who maketh the surrender *continueth in possession*, and not the lord or cestui que use. So in *Fitch v. Hockley* (b), where a copyholder surrendered to certain uses, and then to the use of his will, it was held that the fee remained in the surrenderor, so that he continued tenant to the lord. In *Smith v. Triggs* (c), Pratt C. J. said, "We all know the surrender was only an instrument by which the lord took nothing, and the estate notwithstanding remained in the surrenderor. This is plain from *Cro. Elizabeth*, 441." In *Viner's Abr.* tit. *Copyhold*, P. a. 2., it is said a surrenderee can have no title before admittance, for which *Barker v. Denham* (d) is cited. That case is stated in *Viner's Abr. Copyhold*, B. b. 5., and is as follows: "Custom, &c., that a copyholder might surrender out of Court into the hands of two customary tenants to the use of another, and that, at the next Court, the surrenderee used to be admitted; a surrender was made into the hands of the steward out of the Court, but the party to whose use it was made died before the next Court; and the supplement to *Coke's Complete Copyholder*, s. 4.; citing the same case, says it was resolved that he was not a copyholder within the custom; for by the surrender before admittance the surrenderee *hath no possession*, and the heir is in by descent, and holds by the copy of his ancestor, and so the cestui que use is not a perfect nor

(a) *Cro. Eliz.* 349.(b) *Cro. Eliz.* 449.(c) *Str.* 487.(d) *Styles*, 145.

complete copyholder: and it may be compared to the case where a man makes a feoffment in fee of lands, and makes livery within the view; it is no perfect livery till he doth enter into the lands, but the feoffor may punish a trespass there done in the interim, for it is but inchoatum till he enter; and so it is in the case of a copyholder, the surrender is but quasi inchoatum, as before, till he be admitted to the copyhold." And in *Vin. Abr.* title *Copyholder*, B. b., it is said (citing *Show.* 87.) that a surrenderee, before admittance, has neither jus in re nor ad rem, nor has he any remedy if the lord refuses to admit. And, further, "that a surrenderor of copyhold land continues seised until admittance of the surrenderee;" and *Fisher v. Wigg* (a) is cited. In the same work, title *Copyholder*, D. b. 8. it is said, "if copyholder surrenders to B., and the steward will not admit him, and B. enters and occupies the land, and the lord brings ejectment; B., though not admitted, may plead not guilty, and shall have a verdict; quære rationem, for, in respect of the possession, it seems the lord's title is eldest; for his title to the freehold is good and lawful, and, consequently, to the profits of the freehold, unless another can make title to the profits, which, in this case, seems difficult without an admittance. Quære, if the reason is not that the lord is *particeps criminis*, supposing him not to suffer the steward to admit B." *Arnold v. George* (b). And then there is a note, that in the supplement to *Co. Comp. Copyh.* s. 5., which cites the same case, it is said that it shall be found against the lord, because he is *particeps criminis*, because it shall be intended that the lord would not suffer the steward

1833.

The King
against
Lady Jane
St. John
Mildmay.

(a) 1 P. Wms. 17.

(b) Yelv. 16.

1833.

—
The KING
against
Lady JANE
ST. JOHN
MILDMAY.

to admit him, and Lord *Coke* makes no quære of it. But it is added, that Lord Chief Baron *Gilbert*, in his *Treatise on Tenures*, p. 273., says, it seems to him “that the reason of the case was, that after the surrender *the estate continued in the surrenderor, and not in the lord*; and so the possession of the surrenderee was illegal against the surrenderor, yet it was good against every body else, and so against the lord’s lessee.”

In the great case of *Roe dem. Jeffereys v. Hicks (a)*, where the question arose on a surrender to one who was convicted of felony and hanged without admittance, it was held, after full consideration, that the lands were not forfeited to the lord, but descended to the heir of the surrenderor, and that upon the principle that by the surrender nothing vests in the surrenderee, nor in the lord; but until admittance, the estate in law is in the surrenderor. In *Com. Dig. Copyhold*, G. 3. it is laid down, “if a copyholder surrenders to *A.* for life, who dies, the copyholder shall have it again without re-admittance;” “nothing passes to *A.*, but what is sufficient to supply the estate for life.” *Ibid.* F. 14. So if copyhold lands be surrendered to the use of mortgagee, but mortgagee is never admitted, the mortgagor on devising them must surrender them to the use of his will: *Kenebel v. Scrafton (b)*. But if the lord refuse admittance, the copyholder shall have all actions as if he was admitted, *Com. Dig. tit. Copyholder*, G. 1.

On the death of the surrenderor a heriot will be due, and therefore if he die before admittance of the surrenderee, the latter not being the lord’s tenant, who is to give the heriot? The surrenderor till ad-

(a) 2 *Wils.* 13.(b) 8 *Yes.* 30.

mittance does all suits and services, he sits on the homage, but the surrenderee cannot. The result then is this: in the language of Lord *Hardwicke* in *Hurst v. Morgan* (a), in Chancery, "a surrender does not operate by way of transmutation of the possession; the estate continues in the possessor." If the surrenderee had no right to be admitted, *cadit questio*. If he had, it was by his own laches and wilful neglect to avoid the payment of the fine, that he was not admitted before the forfeiture. In *Tredway v. Fotherley* (b), a copyholder made a conditional surrender for securing money at the end of six months. The money not being paid, and the mortgagee willing to continue his money, they desired the lord that the old surrender might be taken up and a new one made for six months longer, but the lord insisted that the mortgagee should be admitted on the old surrender and fine; and the Court of Chancery would not relieve against the lord. If the estate is not held by the surrenderor, there is no tenant. It is then the lord's for defect of tenants. In *George dem. Thornbury v. Jew* (c), Lord C. J. *Willes* says, "The land which is surrendered to the lord is not vested in him as a trustee, but he is only an instrument or conduit pipe, by or through whom the lands must be conveyed according to the surrender. The lord can never be considered as a trustee, in whom the land is to vest for the benefit of the devisee, for it appears plainly by *Popham* 174., 4 Co. 23. a., and *Cro. Eliz.* 442., that whenever the fee simple of a copyhold is by surrender limited to the use of a will, the fee simple remains in the copy-

1833.

—
The KING
against
Lady JANE
ST. JOHN
MILDMAY.

(a) Serjt. *Hill's* MS.(b) 2 *Vernon*, 367. *Vin. Abr. Copyholder*, 222. O. e. 3.(c) *Ambler*, 628, 9.

holder,

1833.

—
The KING
against
Lady JANE
ST. JOHN
MILDMAY.

holder, and is not vested in the lord. Therefore, he cannot be considered as a trustee, having no estate vested in him for that purpose." These authorities shew that the surrenderor continued tenant to the lord after the surrender, and at the time when he was convicted of felony; that being so, the estate by the custom escheated to the lord. As to the authorities cited on the other side, the lord is expressly excepted in the dictum of *Ashhurst J.* in *Holdfast v. Clapham* (a). In *Burgess v. Wheate* (b), the question arose in a court of equity, and that court refused to give relief where the law would not; and that was the only point decided. The same observation applies to *Taylor v. Wheeler* (c), where the Chancellor thought, that though the surrender was void, yet it bound the land in equity. The passages cited from *Co. Litt.* and *Plowden* do not apply, unless it be made out that the property, between the surrender and admittance, vested in the lord, and did not remain in the surrenderor, and the authorities are all the other way. *Crouther v. Oldfield* (d) shews that the surrenderee is in by the grant of the lord; but he is not tenant till he is admitted: in this view admittance and grant are convertible terms. *Taverner v. Cromwell* (e) establishes that if a copyholder surrenders to the use of another, and the lord admits him, he is in by the surrenderor. In *Peachy v. The Duke of Somerset* (g), Lord *Macclesfield* said, "that the lord must always have such a tenant on his lands as may be sufficient to answer all demands, and capable of committing forfeitures." *Doe v. Wroot* (h)

(a) 1 T. R. 600.

(c) 2 Salk. 448.

(e) 4 Rep. 27 a.

(h) 5 East, 132.

(b) 1 W. B. 125.

(d) 1 Salk. 365.

(g) 1 Str. 451.

is an express authority to shew, that until admittance of the surrenderee of a copyhold on mortgage, the surrenderor continues the legal tenant.

1833.

THE KING
against
LADY JANE
ST. JOHN
MILDMAY

Dampier, in reply. *Southwell* was not guilty of laches; he would not, were he to apply, as he might, to equity, be unassisted. Equity will assist a mortgagor who has let pass the day of repayment. The argument for the lord must go all lengths. It must extend to this: that as some interval *must* take place between surrender and admittance, an act of the surrenderor, in that interval, shall prejudice the surrenderee. A surrender is a charge in this Court as well as in equity. Many cases cited shew that this Court notices real liens; and the cases of vendor and vendee, mortgagor and mortgagee, disseisor and disseisee, apply, as they shew that a tenant may be substituted, on the lord claiming by escheat. No argument arises from illusory surrenders. The lord may refuse admittance on such; and no Court, either by injunction or mandamus, will compel him. A heriot, it is true, is due on *Boyes's* death; for a heriot is a fruit of service, and he is tenant for service. Suppose *Southwell* had been admitted, and died; a heriot would have been due from him, yet *Boyes* (supposing he had committed no felony) could claim from the lord: in truth, all the inconveniences that can be suggested on the part of the defendant apply in cases where the mortgagee has been admitted; but that does not hinder the mortgagor's claim to admittance, on payment of the mortgage money. They are nothing in comparison with the inconveniences set up by the defendant's claim, viz. that in every mortgage, in order to secure the mortgagee, there must be two admittances where

1833.

Wednesday,
June 5th.EDWARDS and Others, Assignees of MAXWELL
HYSLOP, against VERE and Others.

V. and Co., bankers, were assignees of a judgment obtained in Scotland against M. H. for 4100*l.* In 1829 M. H. deposited with V. and Co. 4100*l.*, and by a memorandum in writing it was agreed that that sum should be deposited in their hands for safe custody, on account of M. H., and that from the time such deposit should be made, and during its continuance, V. and Co. were not to pay any interest thereon, and all interest should cease in respect of the amount due upon the judgment. M. H. afterwards became bankrupt, and his assignees on the 19th of Nov. 1831 demanded from V. and Co. the 4100*l.*, which they refused to pay: Held, that they were not liable to pay interest on that sum from the time when payment of the principal was demanded.

ASSUMPSIT for money lent, money paid, and on an account stated. Plea, general issue. At the trial before Denman C. J., at the London sittings after Michaelmas term 1832, the following appeared to be the facts of the case:—

In 1826 one Gordon obtained a final judgment in Scotland against W. Hyslop and Maxwell Hyslop, the bankrupt, for 4100*l.* Gordon, on the 30th of July 1827, assigned the judgment to the defendants. In October 1829 Maxwell Hyslop and T. G. Edwards deposited with the defendants, who were bankers, 4100*l.*; upon which occasion the latter signed the following memorandum:—"It is agreed that a sum of 4100*l.* shall be deposited by Maxwell Hyslop and T. G. Edwards in the hands of Vere, Ward, and Co. for safe custody on account of Maxwell Hyslop and T. G. Edwards; and from the time such deposit shall be made, and during its continuance, Vere, Ward, and Co. shall not pay any interest thereon; and also that all interest shall cease and not be payable upon or in respect of the amount due from Maxwell Hyslop and W. Hyslop to D. Gordon upon the judgment recovered against them, which has been assigned to Vere, Ward, and Co., which, with interest, is now ascertained and settled at 4100*l.*; and such deposit or forbearance of interest shall not give

Vere,

Vere, Ward, and Co. any right or claim to the sum so to be deposited; nor shall the said deposit or this memorandum prejudice or affect such right or claim in any manner except as to the payment of interest as above."

By another memorandum signed by the defendants, they agreed that if *Maxwell Hyslop, T. G. Edwards, T. Kinder* the younger, and *A. Saltmarsh*, or any two of them, of whom *Maxwell Hyslop*, if then living, to be one, should at any time thereafter consider and declare that the whole or any part of the sum of 4100*l.*, which had been that day deposited in the defendants' hands in the joint names of *Maxwell Hyslop* and *T. G. Edwards*, ought to be treated as a total or partial payment of a debt due by *Maxwell Hyslop* and *W. Hyslop* to one *D. Gordon*, and which had been assigned to the defendants as a security for a debt due to them by the said *D. Gordon*, then and in such case the 4100*l.*, as to the whole or so much thereof as aforesaid, should be and be considered as an actual payment on account of the debt due by *Maxwell Hyslop* and *W. Hyslop* from the time of making such deposit with the defendants as aforesaid.

Maxwell Hyslop afterwards became bankrupt, and the plaintiffs were appointed his assignees, and they on the 12th of *November* 1831, demanded the 4100*l.* of the defendants, which they refused to pay. It was contended that the plaintiffs were entitled both to the 4100*l.* and to interest from the day when the demand was made. The learned Judge directed the jury to find a verdict for 4100*l.*, reserving liberty to the plaintiffs to move to increase the damages by adding the amount of interest. A rule nisi having been obtained for that purpose,

1838.

 EDWARDS
 against
 VERE.

1833.

EDWARDS

-against-

HALL.

311

Sir *J. Scarlett* and *Follett* now shewed cause. The general rule as to interest is correctly stated in *Selwyn's Nisi Prius*, 8th edit. p. 376., viz. "that interest ought to be allowed in those cases only where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that interest has been actually made of the money." The present case does not fall within that rule. Here a sum of money was deposited in the hands of bankers, to continue as a security against a judgment obtained against *M. Hyslop* by *Gordon*, and assigned to the bankers. As soon as the deposit was determined by the demand made by the plaintiffs, it became money had and received to their use. There was no contract by the defendants to pay any interest to the plaintiffs or the bankrupt.

The *Solicitor-General* and *Kelly* contra. From the terms of the agreement, a promise by the defendants must be implied to pay interest from the time the money was demanded for they stipulate "that from the time such deposit shall be made, and *during its continuance*, they shall not pay any interest thereon." They must therefore have intended that *as soon as the deposit was determined* they should pay interest; and it ceased to be a deposit as soon as it was demanded by the plaintiffs. In *Randall v. Lynch (a)*, where a ship was let to freight by charter-party from the plaintiff to

(a) 12 *East*, 179.

the defendant, the usual clause in the deed, whereby it was covenanted and agreed between the parties that a specified number of days should be allowed for loading and unloading, and that it should be lawful for the freighter to detain the vessel for those purposes a further specified time, on payment of a daily sum, was held to raise an implied covenant on the part of the freighter that he would not detain the ship for those purposes beyond the two designated periods; and Lord *Ellenborough* there said, "A covenant is nothing more than an agreement of the parties under seal, and if they covenant together that it shall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if then, he detain it beyond the time, it is a breach of the covenant." In *Marshall v. Poole* (a) it was held that where goods are to be paid for by a bill, interest is recoverable from the time when the bill, if given, would have become due, even in an action for goods sold and delivered; and that upon the ground that as the agreement was to give a security which would carry interest, and as the performance of the contract would have entitled the plaintiffs to interest upon the bill, they ought not to be prejudiced by the breach of it.

DENMAN C. J. Generally speaking, money deposited with a banker does not carry interest. The only question is, whether it can be clearly collected here, from the terms of the agreement between the parties, that it

(a) 15 East, 98.

1835.

EDWARDS
against
VEER.

was their intention that interest should be paid from the time when the authority of the bankers to retain the money was countermanded? Now, I think that does not clearly appear; for although, by the agreement, interest is not to be paid during the continuance of the deposit, non constat but that the parties may have considered the deposit as continuing so long as the money actually remained in the hands of the bankers. I therefore think that it does not clearly appear from the agreement, that the intention of the parties was that interest should be payable by the bankers from the time the authority to retain the money was countermanded.

LITTLEDALE J. I also think that interest is not payable in this case. The money paid in to the bankers was not intended to be called for by the plaintiffs from time to time, as money belonging to a customer usually is, but was to remain there as a deposit and a security against the judgment for an indefinite period; and the bankers expressly stipulate that interest shall not be payable "from the time the deposit shall be made, and during its continuance." No contract by the defendants to pay interest is thence to be implied, because as soon as the money ceased to be a deposit, it became applicable to the general purposes of the plaintiffs, in the same way as if it had been paid on their general account into the bankers'; and then it is quite clear that no interest would have been payable by law. It is too much to say, that because the parties expressly stipulated that during the continuance of the deposit no interest should be payable, therefore, as soon as the money ceased to be a deposit, interest was payable.

In

In *Marshall v. Poole* (a), the agreement being to give a security which would carry interest from the time it became due, the law implied from that circumstance an agreement by the vendee, on breach of his contract by not giving the security, to pay interest from that time.

1833.

EDWARDS
against
VINE.

PARKE J. I also think that the plaintiffs are not entitled to interest. They can only be so entitled by the special terms of the agreement. To make out that claim, they must shew that the intention of the parties was, that from the time of determining the deposit, either the money should remain at interest, or interest be paid by the defendants if they did not pay the plaintiffs' checks. No such intention can be collected from the terms of the agreement. As the money was not to be drawn out by checks, to be paid from time to time, but was to continue for a certain period as a deposit in the defendants' hands, they guarded against the possibility of being called upon to pay interest during that period, by expressly stipulating "that they should not be so liable during the continuance of the deposit." As soon as the demand was made, the money ceased to be a continuing deposit; it became, like any other money in a banker's hands, applicable to the general purposes of his customer; and on that he is not liable to pay interest. In *Marshall v. Poole* (a) there was an agreement to pay interest from a specified period; for the vendee agreed to pay for the goods by a bill at a certain date, and that would carry interest from the time when it became due. In *Randall v. Lynch* (b)

(a) 13 East, 98.

(b) 12 East, 179.

1838.

EDWARDS
against
VINE.

the ship was let to freight for a specific voyage; and it was agreed that forty days should be allowed for loading and unloading; so that it appeared clearly to be the intention of the parties that the freighter should quit the ship at the end of a certain time; and that was held to raise an implied covenant on his part not to detain her for loading and unloading beyond that period. So if there were a lease for a specified number of years, and a covenant by the lessor that the lessee should hold during that period, but no express covenant by the latter to quit at the end of the term, the law would raise an implied covenant by the lessee to quit the premises at the end of the term; and if he did not so quit, the lessor's remedy would be in covenant, and not in assumpsit. But the agreement here does not raise the implication contended for.

PATTESON J. The intention of the parties, to be collected from the agreement, was not that the money should remain at interest at all, but as a mere deposit and security against the judgment. I am not prepared to say that the deposit was determined till the money was paid; for money may be said to be deposited in a banker's hands, though it is due, and payable to the party to whom it belongs. This action is founded on the countermand of the deposit by the plaintiffs; but then, as soon as the money was demanded, it remained in the hands of the defendants as bankers, applicable to the general purposes of the plaintiffs, and consequently they are not entitled to interest.

Rule discharged.

1833.

MORGAN and Another, Assignees of T. SHIRLEY, *Wednesday, June 5th.*
a Bankrupt, against BRUNDRETT, Gent. one, &c.

TROVER for plate. Plea, not guilty. At the trial before *Denman C. J.*, at the *London* sittings after last *Michaelmas* term, the following appeared to be the facts of the case:—The bankrupt had carried on business as a wine merchant. In 1821, 1000*l.*, part of the money secured by certain policies of insurance effected on the life of one *Kingsley* with the *Equitable Assurance Company*, was, amongst other property, assigned by deed by the father of the bankrupt to the defendant and one *Newman*, as trustees, for the benefit of *Mrs. Miles*, a daughter of the settlor and sister of the bankrupt, and her children. The money secured by the policies having become payable by the falling in of the life in 1826, the bankrupt obtained the policies, and received the sums assured by them, amounting to 2669*l.*, from the Insurance Company. In 1830 an application was made by the husband of *Mrs. Miles* to the defendant to have the 1000*l.* invested according to the settlement, and the bankrupt was applied to by the defendant to refund the 1000*l.* for the purpose of enabling the defendant and his co-trustee to make the investment. On the 28th of *June* 1831 the solicitors of *Mrs. Miles*, by letter, called upon the defendant and his co-trustee to invest the 1000*l.* for the benefit of *Mr. and Mrs. Miles*, threatening in default of their so doing, to file a bill in equity against them; and on the 3d of *August* 1831 a bill was accordingly filed by *Mr. and Mrs. Miles* against the bankrupt and the defendant and

A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must shew, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy.

his

1833.

EDWARDS

against

WALL.

3-4

Sir *J. Scarlett* and *Follett* now shewed cause. The general rule as to interest is correctly stated in *Selwyn's Nisi Prius*, 8th edit. p. 376., viz. "that interest ought to be allowed in those cases only where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that interest has been actually made of the money." The present case does not fall within that rule. Here a sum of money was deposited in the hands of bankers, to continue as a security against a judgment obtained against *M. Hyslop* by *Gordon*, and assigned to the bankers. As soon as the deposit was determined by the demand made by the plaintiffs, it became money had and received to their use. There was no contract by the defendants to pay any interest to the plaintiffs or the bankrupt.

The *Solicitor-General* and *Kelly* contra. From the terms of the agreement, a promise by the defendants must be implied to pay interest from the time the money was demanded for they stipulate "that from the time such deposit shall be made, and *during its continuance*, they shall not pay any interest thereon." They must therefore have intended that *as soon as the deposit was determined* they should pay interest; and it ceased to be a deposit 'as soon as it was demanded by the plaintiffs. In *Randall v. Lynch (a)*, where a ship was let to freight by charter-party from the plaintiff to

(a) 12 East, 179.

the defendant, the usual clause in the deed, whereby it was covenanted and agreed between the parties that a specified number of days should be allowed for loading and unloading, and that it should be lawful for the freighter to detain the vessel for those purposes a further specified time, on payment of a daily sum, was held to raise an implied covenant on the part of the freighter that he would not detain the ship for those purposes beyond the two designated periods; and Lord *Ellenborough* there said, "A covenant is nothing more than an agreement of the parties under seal, and if they covenant together that it shall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if then, he detain it beyond the time, it is a breach of the covenant." In *Marshall v. Poole* (a) it was held that where goods are to be paid for by a bill, interest is recoverable from the time when the bill, if given, would have become due, even in an action for goods sold and delivered; and that upon the ground that as the agreement was to give a security which would carry interest, and as the performance of the contract would have entitled the plaintiffs to interest upon the bill, they ought not to be prejudiced by the breach of it.

DENMAN C. J. Generally speaking, money deposited with a banker does not carry interest. The only question is, whether it can be clearly collected here, from the terms of the agreement between the parties, that it

(a) 13 East, 98.

1835.

EDWARDS
against
VALL.

was their intention that interest should be paid from the time when the authority of the bankers to retain the money was countermanded? Now, I think that does not clearly appear; for although, by the agreement, interest is not to be paid during the continuance of the deposit, non constat but that the parties may have considered the deposit as continuing so long as the money actually remained in the hands of the bankers. I therefore think that it does not clearly appear from the agreement, that the intention of the parties was that interest should be payable by the bankers from the time the authority to retain the money was countermanded.

LITTLEDALE J. I also think that interest is not payable in this case. The money paid in to the bankers was not intended to be called for by the plaintiffs from time to time, as money belonging to a customer usually is, but was to remain there as a deposit and a security against the judgment for an indefinite period; and the bankers expressly stipulate that interest shall not be payable "from the time the deposit shall be made, and during its continuance." No contract by the defendants to pay interest is thence to be implied, because as soon as the money ceased to be a deposit, it became applicable to the general purposes of the plaintiffs, in the same way as if it had been paid on their general account into the bankers'; and then it is quite clear that no interest would have been payable by law. It is too much to say, that because the parties expressly stipulated that during the continuance of the deposit no interest should be payable, therefore, as soon as the money ceased to be a deposit, interest was payable.

In

In *Marshall v. Poole* (a), the agreement being to give a security which would carry interest from the time it became due, the law implied from that circumstance an agreement by the vendee, on breach of his contract by not giving the security, to pay interest from that time.

1833.

EDWARDS
against
VINE.

PARKE J. I also think that the plaintiffs are not entitled to interest. They can only be so entitled by the special terms of the agreement. To make out that claim, they must shew that the intention of the parties was, that from the time of determining the deposit, either the money should remain at interest, or interest be paid by the defendants if they did not pay the plaintiffs' checks. No such intention can be collected from the terms of the agreement. As the money was not to be drawn out by checks, to be paid from time to time, but was to continue for a certain period as a deposit in the defendants' hands, they guarded against the possibility of being called upon to pay interest during that period, by expressly stipulating "that they should not be so liable during the continuance of the deposit." As soon as the demand was made, the money ceased to be a continuing deposit; it became, like any other money in a banker's hands, applicable to the general purposes of his customer; and on that he is not liable to pay interest. In *Marshall v. Poole* (a) there was an agreement to pay interest from a specified period; for the vendee agreed to pay for the goods by a bill at a certain date, and that would carry interest from the time when it became due. In *Randall v. Lynch* (b)

(a) 13 East, 98.

(b) 12 East, 179.

1833.

EDWARDS
against
V. KEL.

the ship was let to freight for a specific voyage; and it was agreed that forty days should be allowed for loading and unloading; so that it appeared clearly to be the intention of the parties that the freighter should quit the ship at the end of a certain time; and that was held to raise an implied covenant on his part not to detain her for loading and unloading beyond that period. So if there were a lease for a specified number of years, and a covenant by the lessor that the lessee should hold during that period, but no express covenant by the latter to quit at the end of the term, the law would raise an implied covenant by the lessee to quit the premises at the end of the term; and if he did not so quit, the lessor's remedy would be in covenant, and not in assumpsit. But the agreement here does not raise the implication contended for.

PATTESON J. The intention of the parties, to be collected from the agreement, was not that the money should remain at interest at all, but as a mere deposit and security against the judgment. I am not prepared to say that the deposit was determined till the money was paid; for money may be said to be deposited in a banker's hands, though it is due, and payable to the party to whom it belongs. This action is founded on the countermand of the deposit by the plaintiffs; but then, as soon as the money was demanded, it remained in the hands of the defendants as bankers, applicable to the general purposes of the plaintiffs, and consequently they are not entitled to interest.

Rule discharged.

1833.

MORGAN and Another, Assignees of T. SHIRLEY, *Wednesday, June 5th.*
a Bankrupt, against BRUNDRETT, Gent. one, &c.

TROVER for plate. Plea, not guilty. At the trial before *Denman C. J.*, at the *London* sittings after last *Michaelmas* term, the following appeared to be the facts of the case:—The bankrupt had carried on business as a wine merchant. In 1821, 1000*l.*, part of the money secured by certain policies of insurance effected on the life of one *Kingsley* with the Equitable Assurance Company, was, amongst other property, assigned by deed by the father of the bankrupt to the defendant and one *Newman*, as trustees, for the benefit of Mrs. *Miles*, a daughter of the settlor and sister of the bankrupt, and her children. The money secured by the policies having become payable by the falling in of the life in 1826, the bankrupt obtained the policies, and received the sums assured by them, amounting to 2669*l.*, from the Insurance Company. In 1830 an application was made by the husband of Mrs. *Miles* to the defendant to have the 1000*l.* invested according to the settlement, and the bankrupt was applied to by the defendant to refund the 1000*l.* for the purpose of enabling the defendant and his co-trustee to make the investment. On the 28th of *June* 1831 the solicitors of Mrs. *Miles*, by letter, called upon the defendant and his co-trustee to invest the 1000*l.* for the benefit of Mr. and Mrs. *Miles*, threatening in default of their so doing, to file a bill in equity against them; and on the 3d of *August* 1831 a bill was accordingly filed by Mr. and Mrs. *Miles* against the bankrupt and the defendant and

A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must shew, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy.

his

1833.

MORGAN
against
BAUMGARTN.

his co-trustee, calling for an investment pursuant to the terms of the settlement. On the 4th of *August* there was a meeting of the bankrupt's creditors at his own counting-house, and another on the 18th. The defendant was not present at either. On the 10th of *August* no appearance having been entered for the defendant in the Chancery suit, the solicitors for the plaintiff in that suit wrote to the defendant, stating that they had issued an attachment against the bankrupt for non-appearance. The contents of that letter were communicated the next day to the bankrupt by the defendant, and he told the bankrupt that the costs and 1000*l.* must be paid by him eventually, and urged him to pay the money immediately. Another meeting of creditors of the bankrupt took place on the 23d of *August*, at which the defendant attended in the character of solicitor to the bankrupt. The defendant did not then claim to be a creditor, but the bankrupt intimated that a negotiation for a partnership was in progress between himself and another person, and the meeting of the creditors was adjourned, in order to give the bankrupt an opportunity of completing this partnership, it being at the same time distinctly understood that during the interim no payment or preference should be made. On the morning of the 24th of *August* the bankrupt sent two boxes of plate (the subject of the present action) from his house to the chambers of the defendant, with the following letter:—"My dear Sir,—Anxious to bear you and Mr. *Newman* harmless as to the claim for 1000*l.* made by Mr. *Miles*, and to prevent you and him from being taken on the attachment so often threatened by Mr. *Miles's* solicitors, I hereby deposit with you a policy of insurance in the Guardian on the life of *Solomon Carter* for 500*l.*, and my chest of plate, on condition

condition you will invest the above amount." The commission issued on the 28th of *October* 1831. The bankrupt was examined as a witness at the trial, and stated that, before the deposit, he had been repeatedly and urgently pressed by the defendant for the money, or security; that at the time of the meeting on the 23d of *August* he expected to get a partner, and had then not the least idea that he was insolvent, and that he expected to pay 20s. in the pound; but he admitted that he had dishonored his acceptances in *July*, and did not pay any in *August*, and that in those two months the acceptances so dishonored amounted to 1000*l.* His debts were 40,000*l.* Only 4s. in the pound had been paid when this action was brought.

It was contended for the assignees that the delivery of the plate was a voluntary transfer made in contemplation of bankruptcy, and therefore void by the 6 G. 4. c. 16. s. 73. For the defendant, on the other hand, it was urged that the bankrupt at the time when he made the deposit, did not contemplate bankruptcy; and even if he did, still the transfer in question was made in consequence of a pressure upon him by the defendant, and therefore was not a voluntary act.

The Lord Chief Justice told the jury to find for the plaintiffs, if they were satisfied by the evidence, first, that the deposit of the plate was made by the bankrupt in contemplation of bankruptcy, and, secondly, that it was made voluntarily, and not extorted from him by the defendant; and in considering the first question, his Lordship observed, that if the bankrupt, at the time when he sent the plate to the defendant, knew that he was in insolvent circumstances, that of itself was a strong fact, from which they might infer that he contemplated bankruptcy; and it was for them to judge what credit was due

1833.

Moore
against
Bankrupt,

1833.

—
 MORGAN
against
 BRUNDAFT.

due to his statement that he did not then even contemplate insolvency, when it appeared that in *July* and *August* he had dishonored his acceptances to the amount of 1000*l.*, and that his creditors had hitherto received a dividend of only 4*s.* in the pound. And assuming that they should be of opinion that he did contemplate bankruptcy, they were then to consider, secondly, whether the deposit had been made from a fear of adverse proceedings, or merely in consequence of some collusive arrangement between the bankrupt and the defendant? The jury found for the plaintiffs, and stated that there was an undue preference, and that there was nothing compulsory in the proceedings. A rule nisi having been obtained for a new trial on payment of costs, on the ground that the verdict was against evidence,

F. Pollock and *Martin* now shewed cause. The questions were properly submitted to the jury: first, whether the deposit was made in contemplation of bankruptcy; and, secondly, assuming it to have been so, whether it was made voluntarily or under fear of compulsion: *Cook v. Rogers* (a). Now, first, there was ample evidence to warrant their finding that it was made in contemplation of bankruptcy, for from the 3d of *July* 1831 the bankrupt's bills had been dishonored; his debts were 40,000*l.* and the dividend was only 4*s.* in the pound. On the 3d, 18th, and 23d of *August* meetings of his creditors took place, and on the 24th the deposit was made. Then surely the jury might infer, from these facts, that the bankrupt must then have known that he was insolvent, and that he contemplated bankruptcy, which, to a trader, is the probable conse-

(a) 7 *Bing.* 438.

quence of insolvency. It is true that he swore he did not then even contemplate insolvency; but the jury were not bound to credit his testimony, which was inconsistent with the other facts in the case. *Flook v. Jones* (a) and *Poland v. Glyn* (b) shew that a payment made when a bankrupt considers bankruptcy probable, even though not inevitable, is void. Then, assuming that he did contemplate bankruptcy, there was ample evidence to shew that the deposit was made voluntarily by him, and not under fear of compulsion, for the bill in Chancery was not filed until after his insolvency. In *Cook v. Rogers* (c), *Alderson J.*, with reference to the question whether a payment were made voluntarily or not, said, that "the motives and intentions of the bankrupt may be more or less material, according to the nature of the threat, and the degree and period of urgency by the creditor." It is true in *Bayley v. Ballard* (d) Lord *Ellenborough* said, that a payment was not to be considered as voluntary, where the creditor had called upon the bankrupt before the checks (by which the payment was made) were delivered, although they had previously been put into a clerk's hands for the purpose of a voluntary payment; and he observed, that the intermediate demand prevented its being a voluntary preference. [*Patteson J.* The authority of that case was much questioned in *Cook v. Rogers* (e)]. In *Ridley v. Gyde* (g) the act of bankruptcy relied on was, the giving a security to *Gyde* on the 25th of October by way of fraudulent preference, and in contemplation of bankruptcy; and declarations made by the bankrupt on that day, and the

1833.

MONK
AGAINST
BANKRUPTCY.

(a) 4 *Bingh.* 20.(c) 7 *Bing.* 449.(e) 7 *Bing.* 446.(b) *Ibid.* p. 22. note.(d) 1 *Camp.* 416.(g) 9 *Bing.* 349.

1893.

~~Edwards~~
 EDWARDS
 against
 HARRIS.

Sir *J. Scarlett* and *Follett* now shewed cause. The general rule as to interest is correctly stated in *Selwyn's Nisi Prius*, 8th edit. p. 376., viz. "that interest ought to be allowed in those cases only where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that interest has been actually made of the money." The present case does not fall within that rule. Here a sum of money was deposited in the hands of bankers, to continue as a security against a judgment obtained against *M. Hyslop* by *Gordon*, and assigned to the bankers. As soon as the deposit was determined by the demand made by the plaintiffs, it became money had and received to their use. There was no contract by the defendants to pay any interest to the plaintiffs or the bankrupt.

The *Solicitor-General* and *Kelly* contra. From the terms of the agreement, a promise by the defendants must be implied to pay interest from the time the money was demanded for they stipulate "that from the time such deposit shall be made, and *during its continuance*, they shall not pay any interest thereon." They must therefore have intended that *as soon as the deposit was determined* they should pay interest; and it ceased to be a deposit as soon as it was demanded by the plaintiffs. In *Randall v. Lynch (a)*, where a ship was let to freight by charter-party from the plaintiff to

(a) 12 East, 179.

the defendant, the usual clause in the deed, whereby it was covenanted and agreed between the parties that a specified number of days should be allowed for loading and unloading, and that it should be lawful for the freighter to detain the vessel for those purposes a further specified time, on payment of a daily sum, was held to raise an implied covenant on the part of the freighter that he would not detain the ship for those purposes beyond the two designated periods; and Lord *Ellenborough* there said, "A covenant is nothing more than an agreement of the parties under seal, and if they covenant together that it shall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if then, he detain it beyond the time, it is a breach of the covenant." In *Marshall v. Poole* (a) it was held that where goods are to be paid for by a bill, interest is recoverable from the time when the bill, if given, would have become due, even in an action for goods sold and delivered; and that upon the ground that as the agreement was to give a security which would carry interest, and as the performance of the contract would have entitled the plaintiffs to interest upon the bill, they ought not to be prejudiced by the breach of it.

DENMAN C. J. Generally speaking, money deposited with a banker does not carry interest. The only question is, whether it can be clearly collected here, from the terms of the agreement between the parties, that it

(a) 13 *East*, 98.

1833.

EDWARDS
against
VILL.

1855.

EDWARDS
against
VALL.

was their intention that interest should be paid from the time when the authority of the bankers to retain the money was countermanded? Now, I think that does not clearly appear; for although, by the agreement, interest is not to be paid during the continuance of the deposit, non constat but that the parties may have considered the deposit as continuing so long as the money actually remained in the hands of the bankers. I therefore think that it does not clearly appear from the agreement, that the intention of the parties was that interest should be payable by the bankers from the time the authority to retain the money was countermanded.

LITLEDALE J. I also think that interest is not payable in this case. The money paid in to the bankers was not intended to be called for by the plaintiffs from time to time, as money belonging to a customer usually is, but was to remain there as a deposit and a security against the judgment for an indefinite period; and the bankers expressly stipulate that interest shall not be payable "from the time the deposit shall be made, and during its continuance." No contract by the defendants to pay interest is thence to be implied, because as soon as the money ceased to be a deposit, it became applicable to the general purposes of the plaintiffs, in the same way as if it had been paid on their general account into the bankers'; and then it is quite clear that no interest would have been payable by law. It is too much to say, that because the parties expressly stipulated that during the continuance of the deposit no interest should be payable, therefore, as soon as the money ceased to be a deposit, interest was payable.

In

In *Marshall v. Poole* (a), the agreement being to give a security which would carry interest from the time it became due, the law implied from that circumstance an agreement by the vendee, on breach of his contract by not giving the security, to pay interest from that time.

1833.

EDWARDS
against
VINEY.

PARKE J. I also think that the plaintiffs are not entitled to interest. They can only be so entitled by the special terms of the agreement. To make out that claim, they must shew that the intention of the parties was, that from the time of determining the deposit, either the money should remain at interest, or interest be paid by the defendants if they did not pay the plaintiffs' checks. No such intention can be collected from the terms of the agreement. As the money was not to be drawn out by checks, to be paid from time to time, but was to continue for a certain period as a deposit in the defendants' hands, they guarded against the possibility of being called upon to pay interest during that period, by expressly stipulating "that they should not be so liable during the continuance of the deposit." As soon as the demand was made, the money ceased to be a continuing deposit; it became, like any other money in a banker's hands, applicable to the general purposes of his customer; and on that he is not liable to pay interest. In *Marshall v. Poole* (a) there was an agreement to pay interest from a specified period; for the vendee agreed to pay for the goods by a bill at a certain date, and that would carry interest from the time when it became due. In *Randall v. Lynch* (b)

(a) 13 East, 98.

(b) 13 East, 179.

1833.

EDWARDS
against
VINE.

the ship was let to freight for a specific voyage; and it was agreed that forty days should be allowed for loading and unloading; so that it appeared clearly to be the intention of the parties that the freighter should quit the ship at the end of a certain time; and that was held to raise an implied covenant on his part not to detain her for loading and unloading beyond that period. So if there were a lease for a specified number of years, and a covenant by the lessor that the lessee should hold during that period, but no express covenant by the latter to quit at the end of the term, the law would raise an implied covenant by the lessee to quit the premises at the end of the term; and if he did not so quit, the lessor's remedy would be in covenant, and not in assumpsit. But the agreement here does not raise the implication contended for.

PATTERSON J. The intention of the parties, to be collected from the agreement, was not that the money should remain at interest at all, but as a mere deposit and security against the judgment. I am not prepared to say that the deposit was determined till the money was paid; for money may be said to be deposited in a banker's hands, though it is due, and payable to the party to whom it belongs. This action is founded on the countermand of the deposit by the plaintiffs; but then, as soon as the money was demanded, it remained in the hands of the defendants as bankers, applicable to the general purposes of the plaintiffs, and consequently they are not entitled to interest.

Rule discharged.

1833.

MORGAN and Another, Assignees of T. SHIRLEY, *Wednesday, June 5th.*
a Bankrupt, against BRUNDRETT, Gent. one, &c.

TROVER for plate. Plea, not guilty. At the trial before *Denman C. J.*, at the *London* sittings after last *Michaelmas* term, the following appeared to be the facts of the case:—The bankrupt had carried on business as a wine merchant. In 1821, 1000*l.*, part of the money secured by certain policies of insurance effected on the life of one *Kingsley* with the Equitable Assurance Company, was, amongst other property, assigned by deed by the father of the bankrupt to the defendant and one *Newman*, as trustees, for the benefit of Mrs. *Miles*, a daughter of the settlor and sister of the bankrupt, and her children. The money secured by the policies having become payable by the falling in of the life in 1826, the bankrupt obtained the policies, and received the sums assured by them, amounting to 2669*l.*, from the Insurance Company. In 1830 an application was made by the husband of Mrs. *Miles* to the defendant to have the 1000*l.* invested according to the settlement, and the bankrupt was applied to by the defendant to refund the 1000*l.* for the purpose of enabling the defendant and his co-trustee to make the investment. On the 28th of *June* 1831 the solicitors of Mrs. *Miles*, by letter, called upon the defendant and his co-trustee to invest the 1000*l.* for the benefit of Mr. and Mrs. *Miles*, threatening in default of their so doing, to file a bill in equity against them; and on the 3d of *August* 1831 a bill was accordingly filed by Mr. and Mrs. *Miles* against the bankrupt and the defendant and

his

A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must shew, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy.

1833.

—
 Doe dem.
 WILLIAMS
 against
 MATTHEWS.

and paying therefore, &c. the yearly rent or sum of 40*l.* and also such other rents, &c. (as in the former lease.)

The fields called *Caer Berthlwyd* and *Berthlwyd Frythe* were before and at the time of the testator's death part of the demesne lands called *Llwyn*, and therefore within the exception in the power. The two farms called *Cefn-maelen* and *Berthlwyd*, were let by the testator, the year before his death, at yearly rents amounting together to 29*l.*

The lives in the lease of 1818 were in existence when this action was brought. *Robert Nanney* died in 1818. The defendants claimed under the demise to *George Matthews*. The demises to the plaintiff were by parties supposed to be entitled under the will of *Lewis Nanney* the testator if there were no valid lease subsisting under the power which had vested in *Robert*.

J. H. Lloyd for the plaintiff. The demise is void as to that part of the premises which is excepted out of the power; and one entire rent being reserved, it is void as to the whole, *Doe dem. Bartlett v. Rendle (a)*, *Lord Mountjoy's case (b)*. The reason given in the last-mentioned case, and adverted to by *Dampier J.* in *Doe dem. Vaughan v. Meyler (c)*, applies here, namely, that such a demise tends to destroy the evidence of the ancient rent. It may, perhaps, be contended, that no sufficient ground was laid for assuming that the lease of 1800 was surrendered; but that was not brought into question at the trial; the former lease was only produced there to shew what was the rent reserved on *Cefn-maelen* and *Berthlwyd*. At all events, the facts stated on the case

(a) 5 M. & S. 99.

(b) 5 R. 4. a.

(c) 2 M. & S. 276.

are not sufficient to raise that point. It is observable, however, that the two leases are granted for different sets of lives.

1833.

—
Doe dem.
WILLIAMS
against
MATTHEWS.

Welsby, contra. In *Doe dem. Bartlett v. Rendle* (a), the reservation was to be of *the ancient and accustomed yearly rent*; here it is “*of the like rents as are now reserved and payable, or more.*” By the lease of 1800, a rent of 35*l.* was reserved in respect of the two farms formerly let by the testator at 29*l.*; and when the same farms are let in 1813, with the addition of the two fields not comprehended in the power, the rent is 40*l.* for the whole; that is, the former rent of 35*l.* is still reserved out of the two farms, and 5*l.* added in respect of the fields. This distinguishes the case from *Doe v. Rendle* (a), and from *Lord Mountjoy's* case (b), where the rent was reserved out of lands formerly demised, and lands not leased before, and there was nothing to shew that any precise portion of the rent issued out of one or the other. The whole rent here is sufficient in amount. [*Parke J.* It cannot be known, from the data in this case, what would be the proper portion of rent on either part of the demised property, the value of the two closes not being given.] In *Doe v. Meyler* (c), *Dampier* said, that, in adverting to *Lord Mountjoy's* case at the trial, he overlooked the distinction, that the grant and render of one entire rent in that case tended to destroy the evidence of the ancient rent; but that was not so in the case then before the Court, because not any rent was necessary to be reserved for the lands in fee simple; and in *Co. Litt.* 148. b., it is laid down that, “if

(a) 3 M. & S. 99.

(b) 5 Rep. 4. a.

(c) 2 M. & S. 276.

1833.

Doe dem.
WILLIAMS
against
MATTHEWS.

a man be seised of two acres, one in fee and another in tail, and make a lease for life or for years of both acres, and dieth, and the issue in tail avoideth the lease, the rent shall be apportioned." Why may not the rent here as well be apportioned between the lessee and the issue in tail claiming under the will? [*Parke J.* In *Doe v. Meyler* (a) there was a good lease of both portions, during the life of the lessor, by estoppel; and after his death the lease continued good as to the freehold part: it would, therefore, be necessary to make an apportionment.] In *Sugden on Powers*, p. 642. (5th ed.) it is said: — "It frequently happens that lands comprised in a power are demised in the same lease with lands not comprised in the power; or lands are demised, as to some of which the power is duly complied with, and as to others it is not: and in these cases the validity of the lease depends upon the quantum of the rent reserved, and the mode of the reservation." And *How v. Whitfield* (b) is there cited, where the ancient rent of 6s. was required to be reserved, and it appeared that the lands within the power *inter alia* were demised, reserving *proinde* 6s. per annum, and it was held good. [*Parke J.* The point there taken by the Court was, that there appeared to be a distinct reservation of the 6s. rent for the lands comprised in the power. *Patteson J.* In *Doe v. Meyler* (a) it might have been that the proper rent was reserved upon the lands comprised in the power, for *Dampier J.* observed that the lands held in fee might have been demised without any rent. *Parke J.* *Doe v. Meyler* (a) was analogous to the case of a person leasing at an entire rent lands to which

(a) 2 M. & S. 276.

(b) 1 Vent. 338. 2 Show. 57.

he has title and others to which he has none, where, on the lessee being evicted of part by title paramount, the rent may be apportioned (a).]

1833.

DOE dem.
WILLIAMS
against
MATTHEWS.

DENMAN C. J. *Doe dem. Bartlett v. Rendle* (b) is a clear authority for the plaintiff as to the first point; and the second (as to the surrender) does not arise upon the case. The plaintiff must have a verdict for the whole of the premises.

LITLEDAL, PARKE, and PATTESON Js. concurred.
Verdict to be entered as above.

(a) See *Stimson v. Lombard*, 2 East, 575.

(b) 3 M. & S. 99.

LOCKWOOD and Another against THOMAS SALTER and SARAH his Wife. Friday, June 7th.

COVENANT on an indenture made between the defendant Sarah (while unmarried) of the first part, Matthew Carr of the second part, Sophia George of the third part, and the plaintiffs of the fourth part, whereby in consideration of a marriage about to take place between the said M. C. and S. G., and for making some provision for them and the issue of such marriage, the said Sarah covenanted within six calendar months after such marriage to pay the plaintiffs, their executors, &c. 500l., with interest from the time of the marriage till payment: averment that the marriage took place, and six calendar months elapsed: breach, non-payment by Sarah while sole, or by the two defendants since their marriage. Plea, that, since the declaration, but before

To a declaration against husband and wife, for a debt due from the wife before coverture, the husband's discharge under the insolvent act is a good plea.
Quare, Whether it can be replied that the wife had separate property?

X 4

the

1833.

Lockwood
against
Salter.

the time for pleading expired, to wit, on, &c., the defendant *Thomas* was discharged under the insolvent act, wherefore the defendants prayed judgment if the plaintiffs ought further, &c. General demurrer. Joinder.

Cresswell in support of the demurrer. The plea is no answer. The insolvent act only precludes the plaintiffs from taking the person or property of the husband: it is no bar of proceedings against the wife for a cause of action arising before marriage, *Chalk v. Deacon* (a): and execution against her will be enforced by the Court, unless it appears that she has no separate property, *Sparkes v. Bell* (b). In *Pitts v. Meller* (c), and *Finch v. Duddin* (d), the wife being taken in execution in an action against husband and wife, the Court refused to discharge her, no fraud appearing; and, in the latter case, the cause of action seems to have arisen during the coverture. The husband, in this action, was liable to be joined, merely for conformity, to obtain a valid judgment against the wife. If the present plea is an effectual bar, the wife, if the husband died, could not be sued again; the action, though substantially against her, is barred for ever. In *Miles v. Williams et Ux.* (e), it was held that debts of the wife, *dum sola*, were discharged by the husband's bankruptcy: that decision, however, proceeded on a fallacy; viz., that debts due to and from the wife were to be considered in the same light, that, as the one passed to the husband's assignees, so the other must be proved under his commission. But, although debts due to the wife *dum sola* may be reduced into possession by the husband or by his

(a) 6 B. M. 128.

(b) 8 B. & C. 1.

(c) 2 Stra. 1167.

(d) Ibid. 1237.

(e) 1 P. Wms. 249.

assignees for the benefit of the estate, yet, on the other hand, a creditor of the wife before marriage might have execution against any separate estate which she had; and, as to this, the husband's bankruptcy would make no difference, for the separate estate could not be reached by the assignees, *Bosvil v. Brander* (a). [*Little-dale J.* The question, as to the discharge of the wife on the ground that she has no separate property, is matter of equity: the applications in the cases first cited were to the equitable jurisdiction of the Court. *Parke J.* The certificate of bankruptcy is a statutable release of the husband; and, if so, does not it release the wife also?] If the wife is released there can be no right, either legal or equitable, to keep her in custody, whether she has separate property or not. The insolvent act, 7 G. 4. c. 57. s. 46., provides that, by the adjudication there mentioned the insolvent shall be discharged from custody, and entitled to the benefit of the act, "as to the several debts and sums of money due or claimed to be due, at the time of filing such prisoner's petition, from such prisoner to the several persons named in his schedule as creditors;" and by sect. 61. it is enacted, that after any person shall have become entitled to the benefit of the act by such adjudication, no fi. fa. or elegit shall issue on any judgment against such prisoner for any debt with respect to which he shall have so become entitled; and if any action shall be brought against such person for any such debt, it shall be lawful for him to plead generally that he was discharged under the act. It is not meant by this clause that the action shall not be maintainable; still less that it shall be

1833.

LOCKWOOD
against
SALMON.

(a) 1 P. Wms. 458.

barred

1838.

Lockwood
against
Saxton.

barred where the debt was due, not from the insolvent only, but from him and his wife. [*Littledale J.* Would not the creditors of the wife be entitled to a dividend out of the husband's estate?] They might, but they would not be bound to take it. [*Parke J.* An argument like that on section 61. might have been used in *Miles v. Williams (a)*.] That case went on a wrong principle. [*Parke J.* Lord *Redesdale* decided in the same way in the *Matter of M^rWilliams, a Bankrupt (b)*.] That only shews that under the circumstances of that case a debt of the wife might be proved under the husband's commission. It does not follow because his estate is liable, that her's is not. In this case it would be necessary to go the length of saying that a remedy against the husband's estate bars any proceeding against that of the wife. [*Patterson J.* Section 72., which enables a married woman to petition and obtain her discharge, is certainly in your favour, because there it is implied that a judgment has gone against the wife, upon which she has been taken in execution. If she were in custody on mesne process she would be entitled to her discharge independently of the act. That clause was introduced in consequence of the decision in *Ex parte Deacon (c)*.]

Archbold contra. The plea shews good ground of discharge as to the husband, and also as to the wife, during coverture at least. In *Miles v. Williams (d)*, *Parker C. J.* even intimates an opinion that the wife is discharged for ever. In *Sparkes v. Bell (e)*, and *Ex parte Deacon (c)*, the question was, whether the

(a) 1 P. Wms. 249.

(b) 1 Sch. & Lefr. 169.

(c) 5 B. & A. 759.

(d) 1 P. Wms. 257.

(e) 8 B. & C. 1.

Court would interfere for the purpose of relieving the wife, the husband being insolvent: those cases do not bear on that of an action against husband and wife, where the husband, after being discharged under the insolvent act, and having, on that occasion, included the wife's debt in his schedule, is joined in an action against her for conformity. If the wife had separate property available in satisfaction of the debt, that should have been specially replied. By demurring, it is admitted she had none. [*Littledale J.* The separate estate could only be taken notice of on application to the equitable jurisdiction of the Court.] The discharge by adjudication of the Insolvent Court is analogous to that by certificate under a commission; the pleas are similar, except that, in the latter case, the conclusion is to the country. *Miles v. Williams (a)*, is in point; and is confirmed by *M^r Williams's* case (*b*), which shews that, by marriage, the wife's debt becomes that of the husband. [*Patteson J.* But it does not cease to be the wife's.] The reasoning in *Miles v. Williams (a)* is correct. The debts due to the wife pass with her other property to the assignees, who may realize them after the husband's death if they fail to do so in his lifetime; and it would be hard, if, when she has given up her claims against others for the benefit of her husband's estate, she should still remain liable to demands against herself. The seventy-second section was passed to remove difficulties which had arisen in particular instances from the wife not being able to assign or give a warrant of attorney under the insolvent act; but it has no bearing on the present case.

1838.

Lockwood
against
Salter.

(a) 1 P. Wms. 249.

(b) 1 Sch. & Lef. 169.

1893.

LOCKWOOD
against
SALTER.

Cresswell in reply. As to the hardship suggested, a like complaint might be made in cases where the husband has not been insolvent, and property of the wife has become part of his estate. It would also be a case of hardship if the wife survived the husband, and had property to a large amount; and yet (which would follow from the argument on the other side) a creditor could not then sue her for her own debt, because the husband, in his lifetime, had been insolvent. And, if this be not so, why should a creditor, bringing an action in the husband's lifetime, be in a worse situation than one suing after his death? The principle of the insolvent act is only that the person who gives up all shall be discharged. [*Parke J.* The husband gives up all wherewith he might pay the wife's debts.] She may have had no property but such as he could not give up; and, on the faith of that, her debts may have been contracted. The plea of discharge under the insolvent act is given by 7 G. 4. c. 57. s. 61. to "such person" only as shall have been discharged under the act, "his heirs, executors or administrators;" not therefore to his wife. [*Littledale J.* There is a technical difficulty; for it is said in *Com. Dig. Pleader*, 2 A. 3., citing *Cro. Jac.* 288. (*Tampion v. Newson et Ux.*), and *Yelv.* 210. (s. 6.), that, in assumpsit against husband and wife, upon a promise of the wife *dum sola*, both ought to join in plea, and, if the wife alone comes and pleads, there ought to be a replender.] The statute does not authorize her to join in this plea, and she cannot plead alone. [*Archbold.* In *Miles v. Williams* (a), the bankruptcy was pleaded by the husband and wife jointly.]

(a) 1 P. Wms. 249.

DENMAN C.J. I am of opinion that this plea is good; that the debt was that of the husband, and was discharged by his discharge under the insolvent act. *Miles v. Williams* (a) has never been overruled. As to the cases in which applications have been made to this Court to discharge the wife, they turned merely upon the question of equity; the Court did not enter into the principles of law, but only settled what was just as between the parties in the particular case. The wife's property vests in the husband, and her debt is his during the coverture; therefore his discharge from that debt releases her. I admit the consequence to be (as put by Mr. *Cresswell*) that the discharge is a discharge of the wife for ever.

1833.

LOCKWOOD
against
SALTER.

LITLEDALE J. I am of opinion that this plea is good. It appears from the case of *Tampion v. Newson et Us.* (b), that the plea ought to be pleaded by the husband and wife together, and, if this had not been done, the Court would have ordered a replender, which certainly raises some technical difficulty. It is said to be a hardship on the creditor, if this plea be held good, to lose the chance he might have of recovering against the wife after the husband's death; but this is one of the consequences which must result from the relation of husband and wife: and it would, on the other hand, be hard upon the husband if he were not released from this as well as his other debts, since the creditor might have proved it against his estate. If he can bring an action for it, he was entitled to receive a dividend in respect of it; and it would be a just matter of complaint

(a) 1 P. Wms. 249.

(b) Cro. Jac. 288. Yels. 210.

if

1838.

Lockwood
against
Salmon.

if the husband remained liable to be sued, when, by assigning his property, he had left himself no means of satisfying the debt. And I think the wife, as well as the husband, ought to be discharged, inasmuch as he had the opportunity of reducing her property into possession and paying the debt with it. If the husband's discharge were available only as to him, it might follow that a creditor of the wife, though he had received a large dividend out of the husband's estate, might proceed to judgment against her, and, after the husband's death, issue execution against her for the whole. Among the difficulties with which this case is beset, I think the plea is good; and *Miles v. Williams* (a) is an authority. It is suggested that, if the wife had separate property, that fact might be replied. I do not say how this may be; but I am inclined to think it could not be done, and that such property could only be brought in question by an application to a court of equity. The cases in which motions were made to discharge the wife out of custody do not bear on this point, for the reason already given.

PARKE J. I also think this is a good plea, and that the case is decided by *Miles v. Williams* (a), where a question of this kind was fully considered by the Court, and discussed by Lord *Macclesfield* in his judgment. The Lord Chief Justice there laid it down that, under a commission of bankrupt against the husband, the wife's debt was to be considered as that of the husband: and it is the same in the case of insolvency. In each instance he pays by surrendering all his effects, in-

(a) 1 P. Wms. 257.

cluding those of the wife. He gives up that, out of which he might otherwise discharge her debt. This appears to me consistent with good sense, and the decision is followed up by that of Lord *Redesdale* in the *Matter of M^cWilliams* (a). In *Sparkes v. Bell* (b) the Court does not appear to have considered the question whether the wife was discharged by the discharge of the husband; it was an application on her behalf to the equitable jurisdiction of the Court, which ultimately refused to interfere. If the question had arisen on plea, or *audita querelâ*, the result might have been different. *Ex parte Deacon* (c) was a case where the husband had not applied to be discharged under the insolvent act, and it was held that the wife alone could not take the benefit of the act; in consequence of which decision the seventy-second section of 7 G. 4. c. 57. was introduced, not with the intention to apply that clause separately to the wife where the husband obtained his discharge, but that where the wife was in prison and the husband not, or where the husband did not apply for relief under the act, the wife might be discharged on doing justice to the creditors by surrendering her property. As for the case of a wife having separate property, the law does not provide for it: what equity would require under such circumstances is not the question here. At law the matter pleaded is as much a discharge of this as of any other debt of the husband; and as effectual as if he had been released. The judgment must be for the defendants.

PATTESON J. I am of the same opinion, but I found my judgment solely on the decision in *Miles v. Williams*

(a) 1 Sch. & Lef. 169.

(b) 8 B. & C. 1.

(c) 5 B. & A. 759.

1833.

Lawrence
against
Bulmer.

1833.

LOCKWOOD
against
SALTER.

et Ux. (a), recognised by Lord *Redesdale* in the *Matter of M^r Williams (b)*. I am not satisfied with the reasoning in the former case, but I think we are bound by the decision. It is indeed inconsistent with *Sparkes v. Bell (c)*, but there *Miles v. Williams* was not fully considered. Cause was shewn there against a rule for superseding an order to discharge the wife out of custody; and the principal ground taken by counsel was, not that the order was right (she being a married woman having separate property), but that it was too late to apply to rescind it, inasmuch as the husband had in the mean time been discharged under the insolvent act. That application was to the equitable jurisdiction of the Court. One argument there used was, that the wife, when taken, could not obtain her discharge under the act, to which effect *Ex parte Deacon (d)* was cited, but without advertng to the seventy-second section of 7 G. 4. c. 57., which had been passed since that case was decided, and under which she might have applied for her discharge, unless that clause be confined to cases where the husband has not been taken in execution, or, being taken, will not apply for the benefit of the act. I do not, however, see any reason for so confining that clause, rather thinking, as at present advised, that it was intended to operate so as to make the separate property of a married woman available to her creditors, and that on that ground the decision in *Sparkes v. Bell* may be supported. I do not say what would be the case if to a plea like this it were replied that the wife had separate property; but upon the present record the defendant is entitled to judgment.

Judgment for the defendant.

(a) 1 P. Wms. 249.

(c) 8 B. & C. 1.

(b) 1 Sch. & Lef. 169.

(d) 5 B. & A. 759.

1833.

DIXON and Another *against* YATES, KAYE, BOND, *Friday,*
and PROCTOR. *June 7th.*

THIS was a feigned issue under the interpleader act, 1 & 2 W. 4. c. 58., to try whether the property in, or the right of possession of, forty-four puncheons of rum, then being in a certain warehouse of the defendant *Yates*, or any part thereof, was in the plaintiffs on the 18th of *November* 1831, when they demanded the same of *Yates*, and he refused to deliver the same or any part thereof to the plaintiffs. At the trial before *Patteson J.*, at the *Lancaster* Spring assizes 1832, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case: and it was agreed that the Court should be at liberty to draw from the facts therein stated any inference that the jury might have drawn.

On the 28th of *June* 1831, the plaintiffs, spirit merchants at *Liverpool*, bought of the defendant *Yates* 147 puncheons, 10 hogsheads, 2 barrels of rum, which had been bonded by *Yates* in his own name, and placed by him in his own bonded vaults, in *Atherton Street*,

D. bought of *Y.* forty-six puncheons of rum, lying in the warehouse of *Y.*, at *Liverpool*, and sold them to *C.*, who was a clerk of *Y.*, but carried on business for himself. *D.* gave *C.* an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum, and the samples which had been taken, remained in *Y.*'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at *Liverpool*, is by the vendor's giving a de-

livery order to the vendee. *D.* was asked by *C.* for delivery orders, but declined giving any, except for two or three puncheons, which *C.* received. *C.* marked, coopered, and gauged the casks. While the bills were running, *C.* sold twenty-six of the puncheons to *K.*, who paid him for them, and who, by *C.*'s permission, without the knowledge of *D.*, gauged and coopered the casks in the warehouse of *Y.*, and marked them with his initials. *C.* gave an invoice to *K.*, stating the marks and numbers of the casks, and by whom the rum was bonded. *C.* also, while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices, and samples; and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by *D.* They paid *C.* for the whole. The bills given by *C.* for the price of the forty-four puncheons were dishonoured; Held, upon special case, (whereby it was agreed that the Court should be at liberty to draw from the facts any inference that the jury might have drawn,) that *C.* never had acquired the actual possession of the rum, and on his dishonouring his acceptances, *D.* had a lien on it for the price; and that *C.*'s subvendees could not claim against *D.* the rum which remained undelivered to them.

VOL. V.

Y

Liverpool.

1833.

DIXON
against
YATES.

Liverpool. At the time of this purchase *Yates* handed an invoice to the plaintiffs, specifying the marks and numbers of each puncheon or cask, and the name of the vessel which imported it; and at the bottom was written, "Warehoused per *J. B. Yates* and Co., in *Yates's, Atherton Street.*" The price, 1812*l.*, was paid by the plaintiffs to *Yates*, in *August* and *September*. On the same 28th of *June* on which this purchase was made, the plaintiffs resold a part, viz. 35 puncheons, to *Collard*, who was clerk to *Yates*, and also carried on business on his own account, as a spirit merchant, with the knowledge of his employer. For the price of this parcel of 35 puncheons, *Collard* accepted two bills for 240*l.* each; and after the sale, the plaintiffs gave *Collard* delivery orders on *Yates* for the whole 35 puncheons. The invariable mode of delivering goods in warehouses at *Liverpool*, is by handing delivery orders. *Yates* kept no transfer books. On the 5th of *October* 1831, one of the bills given in payment for the parcel of 35 puncheons was dishonoured, and was taken up by the plaintiffs. Up to that time *Collard* had been in good credit with the plaintiffs. When the other bill was nearly at maturity, the plaintiffs, on the 29th of *October*, 1831, to save their own and *Collard's* credit, advanced money to take it up. Both bills were in the hands of *Moss* and Co. the plaintiffs' bankers.

On the 13th of *August* 1831, the plaintiffs bought of the defendant *Yates* another parcel, consisting of 51 puncheons of rum, which had been imported from *Jamaica* in the ship *Alecto*, and which were bonded by him in his own name, and placed in his own bonded vaults in *Atherton Street*. *Yates* gave an invoice as follows:— "*Liverpool*, 13th of *August* 1831, Messrs.

W. Dixon

W. Dixon jun. and Co. Bought from *J. B. Yates and Co.* 51 puncheons *Jamaica* rum. Payment two months and two months." The numbers and marks of the casks were then inserted, and at the bottom there was a memorandum, "Warehoused per *J. B. Yates and Co.* 29th of *July* 1831, in *Atherton Street*." The price of this lot, 624*l.* 6*s.* 1*d.*, was paid by the plaintiffs on the 5th of *November* 1831. On the same day on which this latter purchase was made by the plaintiffs, viz. the 13th of *August* 1831, they sold to *Collard* 46 puncheons; viz., 10 puncheons of the parcel first above mentioned, of 147 puncheons, 10 hogsheads, and 2 barrels; and 36 of the 51 puncheons last mentioned; and they delivered to him an invoice specifying the marks and numbers of each puncheon. For the price, 589*l.* 6*s.* 2*d.*, *Collard* accepted two bills drawn upon him by the plaintiffs, dated the 13th of *August* 1831, payable respectively at three and four months, at *Barclay, Trittons, and Co.* in *London*. One of these bills the plaintiffs paid away; the other they paid to their bankers as cash.

After the last-mentioned purchase by *Collard* from the plaintiffs, he applied to them for delivery orders on *Yates*, which they refused to give; but said that, if he wanted one or two puncheons, they would let him have them. *Collard* addressed to the plaintiffs two orders in the following form:—"Messrs. *W. Dixon and Co.* please to deliver one puncheon of rum, *J. B.* 7. *J. F.* 33., bought 13th of *August* 1831. *A. W. Collard*." The plaintiffs gave corresponding orders upon *Yates*, and the two puncheons were delivered to a purchaser from *Collard*. These two puncheons were part of the 46 sold to

1833.

 DIXON
 against
 YATES.

1833.

 DEMON
 against
 YATES.

Collard on the 13th of *August*, and the delivery order for the two puncheons was produced from the possession of *Collard's* assignees. At the trial the remaining 44 puncheons sold to *Collard* on the 13th of *August* were the subject-matter of the issue.

On the 16th of *November* 1831, the first of the two bills accepted by *Collard* for the 46 puncheons became due in *London*, and was dishonoured. It was returned to and taken up by the plaintiffs on the 19th of *November*; and the other bill was also dishonoured when at maturity, and taken up by the plaintiffs. *Collard's* insolvency was generally known at *Liverpool* about the 12th or 14th of *November*.

On the 18th of *November* 1831, the plaintiffs gave notice to the defendant *Yates* not to deliver the rum to any person but themselves. On the 19th they made a verbal demand, and on the 21st, a written demand, of the rum, which *Yates* refused to deliver. The plaintiffs had had dealings with *Yates* often before, for some years back, and had bought of him large quantities of rum, which they left in his cellars; and when they effected re-sales, they gave delivery orders to the purchasers, and *Yates* had not delivered any of such rums bought on former occasions by the plaintiffs without delivery orders from them. *Yates* was not in the habit of accepting general delivery orders; but when the plaintiffs bought of him goods lying in bond, they got orders accepted when they wanted them out. In the mean time, the plaintiffs looked after the casks, sampled them, and coopered them, as occasion required. The plaintiffs did not get a delivery order accepted for either of the parcels bought by them on the 28th of *June* and the 13th of *August* 1831, but resold a part of each parcel to *Collard*

on

on the day of the purchase; to which re-sale the want of a delivery order was no impediment.

The rums which the plaintiffs bought on the 28th of *June* and 13th of *August* were sampled on the quay when landed, and the samples taken to *Yates's* sale room. The plaintiffs received the samples of those which they did not sell to *Collard*, but not of those which they did. *Collard* kept the remainder at *Yates's*. It is the custom for purchasers of rum always to take the samples, and to cooper the casks. *Collard*, soon after the purchase, had the puncheons which he bought coopered in *Yates's* warehouse, and marked with the letter *C*. The plaintiffs never touched those puncheons, or sampled them, but left *Collard* to look after them until the 21st of *November*, when they had them sampled.

On the 28th of *October*, after the negotiation of the bills given by *Collard*, and before they had arrived at maturity, *Collard* sold 26 puncheons, part of the 46 which he had bought of the plaintiffs on the 13th of *August*, to the defendant *Kaye*, who, on the 31st of *October*, accepted bills for the price, which were duly honoured. *Collard* got those acceptances from *Kaye*, between ten and twelve in the morning of the 31st of *October*. An invoice containing the marks and numbers of the casks, and stating where and by whom the rum was bonded, was made out and delivered by *Collard* to *Kaye*.

On the 31st of *October*, the cooper employed by the defendant *Kaye* applied at the counting-house of *Yates* for permission to have the 26 puncheons coopered and gauged, on behalf of *Kaye*, and about nine o'clock of that morning, *Yates's* warehouseman accompanied the

1833.

 DIXON
 against
 YATES.

1833.

DIXON
against
YATES.

cooper to the warehouse of the defendant *Yates*, when the cooper prepared the casks for the gauger, and marked them *J. A. K.* On the same day the gauger attended, and gauged the puncheons on behalf of *Kaye*; and on that and the following day the cooper coopered the casks on his behalf. The warehouseman of the defendant *Yates* was present nearly all the time of gauging and coopering the puncheons. If the cooper had met with any impediment at *Yates's* at nine o'clock that morning, there would have been time to inform *Kaye* before he had accepted the bills of *Collard*. When the persons came from the defendant *Kaye* to gauge the rums, they were refused three times by a clerk of *Yates*; then *Collard* came and had it done. The coopering and marking were also done with *Collard's* knowledge, and by his permission. On the 19th of *November*, *Kaye* presented to the plaintiffs, for their acceptance, a delivery order for the 26 puncheons bought by them of *Collard*, which the plaintiffs refused to accept.

The remaining 18 puncheons were sold by *Collard*, on the 7th of *September*, to the defendants *Bond* and *Proctor*, and he made out and delivered to them an invoice specifying the marks and numbers of the puncheons, and where and by whom the same was bonded. On the 9th of *September*, *Bond* and *Proctor* settled with *Collard* for these rums; partly by cash, partly by brandies which had been bought before, partly by wines bought then, and partly by a bill for 39*l.*, which was afterwards paid. The samples of these 18 puncheons, and which were part of the samples which *Collard* kept at *Yates's* counting-house, were taken to *Bond* and *Proctor*, after the sale to them; out of this lot of

18 pun-

18 puncheons, *Yates* delivered three to the defendants *Bond* and *Proctor*, with the assent of *Collard*, viz. one on the 15th of *October*, one on the 1st of *November*, and one on the 8th of *November*, upon separate delivery orders, signed by *Bond* and *Proctor*, and without any delivery order from the plaintiffs.

On the 19th of *November* *Bond* and *Proctor* presented to the plaintiffs, for acceptance, a delivery order for the remainder of the rums sold to them by *Collard*, which the plaintiffs refused to accept.

On the 21st of *November*, after the demand made on *Yates* by the plaintiffs, they, by his permission, sampled the 41 puncheons then remaining in his warehouse.

In *October* 1830, the plaintiffs bought a quantity of rum from *Yates* at two and three months' credit, which they resold on the same day to *Collard*.

Cresswell for the plaintiffs. The plaintiffs bought the rum of *Yates*, paid for it, and were thereupon entitled to the possession. As between *Yates* and them, if no jus tertii can be set up, they are clearly entitled to recover. *Yates* was never authorised by the plaintiffs to deliver the rum to any other person; and the plaintiffs cannot be affected by that which was done between *Collard* and the other defendants. *Collard* bargained for the rum, and gave bills in payment: and it may be said, that as he purchased on credit, while the bills were running, he might have claimed to have possession. But, first, there is evidence of a contract, or condition, that the plaintiffs should not part with the possession till the bills were paid. *Collard* asked for a general delivery order; the plaintiffs refused to give it: they offered an order for one or two puncheons,

1833.

 DIXON
against
YATES.

1833.

 DIXON
 against
 YATES.

and that order *Collard* accepted. There was, therefore, an assent on his part to the residue of the rum remaining in the plaintiffs' hands, and he could not then confer a right on a third person. Secondly, as *Collard* did not, in fact, insist upon possession while the bills were running, the plaintiffs, after the bills were dishonoured, had a right to retain the rum; and *Collard's* right of possession was defeated by his subsequent insolvency: *Bloxam v. Sanders* (a), *Bloxam v. Morley* (b). For though the property in goods, sold upon credit vests in the vendee, it is liable to be divested if the contract is not performed by the purchaser, *Langfort v. Tiler* (c), *Anonymous, Dyer*, 29. b. An attorney having a lien on papers, loses it by taking a bill for his demand, but if that is dishonoured, his lien revives, *Stevenson v. Blakelock* (d); and where goods are in transitu, insolvency of the purchaser before delivery authorises the consignor to resume possession: *Clay v. Harrison* (e). The acts of *Collard* in marking, gauging, and cooping, were not sufficient to deprive the plaintiffs of their lien; for even although those acts might be considered as done with the plaintiffs' consent, they were not, as between the parties, sufficient to constitute a delivery or taking possession. The custom as to delivery orders was well known to *Collard*; and there is no case to shew that the lien was determined by such acts, unless they were intended by the parties to have such effect; and here the vendors had no such intention. A consignor's right to stop in transitu is not taken away by the consignee's having partly paid for the goods,

(a) 4 B. & C. 941.

(b) 4 B. & C. 951.

(c) 1 Salk. 113.

(d) 1 M. & S. 535.

(e) 10 B. & C. 99.

nor by his putting his initials on them, that not being done by way of taking possession, *Hodgson v. Loy* (a). Such marking by a vendee does not amount to an acceptance within the statute of frauds, *Baldey v. Parker* (b). And where goods were bonded in the vendor's name, partly in his own and partly in the warehouses of other persons, and he resold to A., who took samples out of the bulk and marked the casks with his initials, but he did not get any delivery order, nor give notice to the owners of the warehouses, it was held that the goods remained in the order and disposition of the vendor, who afterwards became bankrupt, and passed to his assignees: *Knowles v. Horsfall* (c).

It may be said that, by the delivery of part, the whole vested in *Collard*. But the answer to that is, that a delivery of part can only operate as a constructive delivery of the whole, *when so intended*. In *Slabey v. Hayward* (d), where the delivery of part was held to destroy the right of stopping the remainder in transitu, there appeared to be no intention, either previous to or at the time of delivery, to separate that part of the cargo from the rest. In *Hinde v. Whitehouse* (e) the samples were delivered as part of the things purchased, to make up the quantity. In *Bloxam v. Sanders* (g) samples and invoices were delivered; but it was held that there was no delivery of the article purchased; and in *Cooper v. Elston* (h), where a sample of wheat was delivered, but it was no part of the quantity sold, that was held to be no delivery to take

1833.

 Dixon
against
Yates.

(a) 7 T. R. 440.

(b) 2 B. & C. 37.

(c) 5 B. & A. 134.

(d) 2 H. Bl. 504.

(e) 7 East, 558.

(g) 4 B. & C. 947.

(h) 7 T. R. 14.

1893.

 DIXON
 against
 YATES.

the case out of the statute of frauds. So far as to *Collard*.

Then the subvendees cannot be in a better situation. First, as to *Kaye*: on the 28th of *October*, he bought 26 puncheons of *Collard*, accepted bills on the 31st of *October*, and received an invoice, shewing where the rum was bonded, and by whom. *Kaye* sent the gauger and cooper to gauge and mark the casks; but *Yates's* clerk refused to let them do it; *Collard* then came and had it done. A prudent purchaser would have enquired whose property it was: he would have learnt the circumstances, and that there could be no valid transfer without a delivery order.

Then as to *Bond* and *Proctor*. *Collard* sold the 18 puncheons on the 7th of *September*, and on the 9th they paid him for them, partly by cash and bills, partly by writing off an old debt. The samples were taken to their counting-house from *Yates's*, where they had previously been left. *Bond* and *Proctor* presented delivery orders to the plaintiffs for acceptance. If the taking of the samples at first by *Collard* did not operate as a delivery to him, no more would the taking of them be a delivery to *Bond* and *Proctor*. They shewed they had knowledge of the custom of trade by producing delivery orders. In *Stoveld v. Hughes* (a), there was an assent by the first vendor to the sub-sale. In *Chaplin v. Rogers* (b), there was evidence of a delivery of the whole to the first vendee. In *Hammond v. Anderson* (c) there was an order for delivery of the whole to the vendee. It may be said that the giving of an invoice to *Collard* enabled him to go into the market

(a) 14 *East*, 308.(b) 1 *East*, 192.(c) 1 *New R.* 69.

and sell the goods; but there was no act done by the plaintiffs which enabled *Collard* to deceive a cautious purchaser. The custom of *Liverpool* was well known, and no delivery order was given. The invoices delivered by *Collard* to the sub-vendees stated where the goods were bonded, and in whose name; and therefore they might enquire. It does not appear that the invoice held by *Collard* was ever seen by them.

1833.

 DIXON
 against
 YATES.

Wightman for *Kaye*. *Kaye* is entitled to recover against *Yates* the 26 puncheons of which he was the purchaser. If *Collard* had the property in him at one time, *Kaye* now has it. The only difference is, that *Collard*, after having dishonoured his bills, would not have been able to enforce his claim against the plaintiffs; but he, before the dishonour of the bills, having transferred the goods to *Kaye*, who paid for them, the right of property is in the latter. All acts of ownership were exercised by *Collard* and by *Kaye*; *Collard* took samples and he and *Kaye* marked and coopered the casks. *Collard*'s bills were immediately negotiated by the plaintiffs; they then became, and continued at the time of the sale by *Collard* to *Kaye*, paid vendees, and had no lien: *Horncastle v. Farran* (a). It is true no delivery order was given by the plaintiffs; but that is not usual until goods are wanted. The plaintiffs themselves had no delivery order, but they had paid: so had *Kaye*. If either party is to sustain a loss, it should be that person whose conduct, in giving credit to a second party, has enabled the latter to sell to a third party, by whom he has been actually paid. Here the plaintiffs were in

(a) 3 B. & A. 497.

fault,

1833.

 DIXON
 against
 YATES.

fault, by suffering *Collard* to appear to third persons as a vendor having title. The plaintiffs never exercised any acts of ownership: they never touched the property. [*Parke J.* They touched it as much as if they had bought it from a third person, and had paid for it and delivered it to *Yates* as a warehouseman. He was their agent; the goods were ascertained, their right to them was ascertained; they had put their marks upon the casks, and there was a valid contract as between them and *Yates*, by which the property vested in them.] There was an equally valid contract to pass the property as between the plaintiffs and *Collard*. The plaintiffs had not refused to give *Collard* any delivery order, they only said if *Collard* wanted one or two he should have them; but they could not have absolutely refused to give him a general order while his bills were outstanding, without subjecting themselves to an action. Then *Collard*, having the property in the rums, sold 26 puncheons to *Kaye*. It is not found that the invoice held by *Collard* was ever shewn to *Kaye*; but the plaintiffs, by giving *Collard* such a document, might have misled purchasers, and were therefore in fault. It is said that *Kaye* ought to have enquired whether the rums had been actually delivered to *Collard*. If he had done so, *Collard* would have shewn him the invoice, by which he would have appeared as the purchaser. *Davis v. Reynolds* (a) shews that a vendor who takes the vendee's acceptance in payment cannot stop the goods in transitu. [*Patteson J.* Unless the bill has been dishonoured.] If the original vendor give credit, by taking the vendee's acceptance in payment, he thereby gives the vendee a *jus disponendi*. *Kaye* is entitled as against

(a) 4 *Campb.* 267. 1 *Stark.* 115.

Yates,

Yates, because he, by *Collard*, his clerk and agent, allowed *Kaye* to put his marks on the casks, and thereby induced him to give *Collard* bills in payment. *Collard*, who is both the vendor and purchaser of these goods, has the management of *Yates's* cellar, and is permitted by him to appear as if he had the disposal of them. It is not, therefore, for *Yates* now to set up a *jus tertii* against a purchaser from *Collard*. He must take the consequences of *Collard's* acts. [*Parke J. Collard* was the vendor, as between him and *Kaye*, and must be considered as a third party, unconnected with *Yates*. *Patteson J.* In *Craven v. Ryder* (a), the goods were sold under a contract to deliver them free on board a vessel named by the buyer. The vendors delivered them on board such vessel, and took a receipt which purported that the goods sold were received on their (the vendors') account. The vendee accepted bills for the amount, but, before they became due, stopped payment; and there, although the master of the vessel had executed a bill of lading to a subsequent purchaser, it was held that the first vendors retained their property in the goods by keeping the receipt for them; and that, so long as they kept the receipt in their own hands, there was not a complete delivery to the buyer.] In the present case it appeared that delivery notes were only taken as wanted. The goods remained in the hands of the warehouse keeper as the agent of the purchaser; and the right of property passed to the subsequent vendees in the same manner as it did to the first.

Roscoe for *Bond* and *Proctor*. It cannot be disputed, that at the time of the sale by *Collard* to *Bond* and

1833.

DIXON
against
YATES.

(a) 6 Tunn. 433. 2 Marsh, 127.

1833.

 DIXON
 against
 YATES.

Proctor (which was before *Collard's* insolvency), the right of property and possession had passed to *Collard*. The original vendor could not then have refused to deliver to a purchaser or a sub-purchaser. Then did *Collard's* subsequent insolvency divest that right? The plaintiffs' right, which revived on the non-payment of the bills by *Collard*, was merely an equitable lien. It is similar in principle to the right of stopping in transitu, which is an equitable right only. This is laid down by *Buller J.* in *Lickbarrow v. Mason (a)*, and *Ellis v. Hunt (b)*; and by Lord *Kenyon* in *Hodgson v. Loy (c)*; and Mr. *Bell* in his *Commentaries on the Laws of Scotland*, p. 209., where all the cases are collected, says that the right is founded entirely on equity. If the right of stopping in transitu be only an equitable lien, it is clear that it cannot be exercised by the plaintiffs (who enabled *Collard* to go into the market with an apparent title) against *Bond* and *Proctor*, who are purchasers for value, and without notice of any defect of title in the vendee. In *Lempriere v. Pasley (d)*, *Ashhurst J.* says, "As between a person who has an equitable lien, and a third person, who purchases the thing for a valuable consideration, and without notice, the prior equitable lien shall not overreach the title of the vendee." So in *Snee v. Prescott*, reported in 1 *Atykins (e)*, but more accurately stated in the judgment of *Buller J.* in *Lickbarrow v. Mason (g)*. Lord *Hardwicke* says, "where goods have been negotiated and sold again there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price;

(a) 6 *East*, 27. note.(b) 3 *T. R.* 469.(c) 7 *T. R.* 445.(d) 2 *T. R.* 490.(e) 1 *Atk.* 245.(g) 6 *East*, 28. note.

1833.

 DIXON
 against
 YATES.

for then no dealer would know when he purchased goods safely." In *Kinlock v. Craig* (a), *Eyre C. B.* says, that "the right of stopping goods in transitu never occurs but as between the vendor and vendee;" and *Buller J.*, in *Lickbarrow v. Mason* (b), considers the terms vendor and vendee, as used by *Eyre C. B.*, to apply to the persons who buy of and sell to each other. *Bayley J.*, in *Hewes v. Watson* (c), speaking of the ordinary case of a vendor and vendee, says, "In such cases, justice requires that the vendee shall not have the goods unless he pays the price. If he cannot pay the price, the vendor ought to have his goods back; but if the question arises, not between the original vendor and the original vendee, but between the original vendor and a purchaser from the vendee, that purchaser having paid the full price for the goods, what is the honesty and justice of the case? surely that the vendee, who has paid the price, shall be entitled to the possession of the goods." The present case must be governed in principle by *Lickbarrow v. Mason* (d), which was decided upon the ground, that the property was transferred by the indorsement of the bill of lading; which, in fact, is no more than a declaration by the consignee, that the indorsee of the bill of lading is the owner of the goods. Now, an invoice is a declaration by the vendor that the purchaser is the owner of the goods, and it ought to have the same effect. In *Green v. Haythorne* (e), there had been an invoice and samples given to the purchasers, who resold, and the vendors had delivered (as here) parcels of the goods to different sub-purchasers; and Lord *Ellen-*

(a) 3 T. R. 787.

(b) 6 East, 31. note.

(c) 2 B. & C. 542.

(d) 2 T. R. 63. 1 H. Bl. 357. 6 East, 20. n. (a).

(e) 1 Stark. 447.

1833.

 Dixon
 against
 Yates.

borough says, "I am of opinion that this was an executed contract. Here was a sale of 68 bags, which were delivered out by the vendors from time to time, according to the order of the vendees, who were furnished with an invoice and samples to enable them to go into the market." A new trial was moved for, and refused, on the ground that the vendors, who had received a delivery order from the sub-purchasers before the insolvency of the purchasers, should have repudiated it in order to retain their lien. Here, it appears, that the first bill given by *Collard* for the 35 puncheons, purchased by him from the plaintiffs on the 28th of *June*, was dishonoured on the 5th of *October*, and taken up by the plaintiffs; on that day, therefore, they knew of his insolvency. Yet, subsequently, on the 15th of *October*, and the 1st and 7th of *November*, their agent, *Yates*, delivered three puncheons to the order of the defendants *Bond* and *Proctor*. The plaintiffs cannot, after a recognition of *Bond* and *Proctor*'s title, with notice of *Collard*'s insolvency, turn round upon *Bond* and *Proctor*, and insist upon their lien. They should, at least, when the delivery order of *Bond* and *Proctor* was presented, on the 15th of *October*, have informed them that *Collard* was insolvent, and that they insisted upon their lien. And the delivery of two puncheons to the order of *Collard*, and of three to the order of *Bond* and *Proctor*, was such a delivery of part as amounted to a constructive delivery of the whole, and put an end to the right of the plaintiffs to retain the remainder: *Slubey v. Hayward* (a), *Hammond v. Anderson* (b). It is true, that a part delivery, where some act remains to be done before

(a) 2 H. Bl. 504.

(b) 1 New R. 69.

the property in the whole can vest in the vendee, will not vest the whole in him; and upon that ground it was decided, in *Hanson v. Meyer* (a), that a part delivery of goods did not divest the right of the vendors to stop the remainder in transitu. [Per Lord *Ellenborough*, in *Stoveld v. Hughes* (b), and *Littledale J.* in *Simmons v. Swift* (c)]. But "whenever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder:" per *Bayley J.*, in *Crawshay v. Eades* (d). Supposing the plaintiffs, notwithstanding the sale by *Collard* to *Bond* and *Proctor*, would have had a right to stop the goods, that right has been divested. The right to stop in transitu is defeated, if the goods have come to the possession of the vendee: but where they are in the possession of an agent or warehouseman (even the vendor's), the lien may be defeated by circumstances which are evidence of delivery; as the transfer of the goods in the warehouseman's books from the vendor's into the vendee's name, *Harman v. Anderson* (e); or the receipt of warehouse rent from the vendee, *Hurry v. Mangles* (g); or any act of ownership exercised upon the goods by him, such as the marking, or the packing or unpacking the goods by him: *Ellis v. Hunt* (h), *Stoveld v. Hughes* (b), *Wright v. Lawes* (i). Here *Yates* became the agent or servant to *Collard* as soon as the latter marked and coopered the casks, and had samples. The fact of the plaintiffs having omitted to give a delivery order is immaterial, because their suffering *Collard* to deal with the

1833.

 DIXON
against
YATES.

(a) 6 East, 614.

(c) 5 B. & C. 864.

(e) 2 Campb. 243.

(h) 3 T. B. 464.

(b) 14 East, 313.

(d) 1 B. & C. 183.

(g) 1 Campb. 452.

(i) 4 Esp. N. P. C. 84.

1893.

Dixon
against
Yates.

property as his own is stronger than any delivery order. In *Foster v. Frampton* (a) the purchaser went to the warehouse of the carrier and took away part of the goods, and desired that the rest might remain in the warehouse, and it was held that the transitus was thereby at an end. As to the question whether the plaintiffs by giving a receipt enabled *Collard* to commit a fraud, and so are precluded from recovering, *Bayley J.* in *Hawes v. Watson* (b) says, "There are many cases in which it has been held that if the first vendor does any thing which can be considered as sanctioning the sale by his vendee, that destroys all right of the former to stop in transitu." [*Parke J. Bond* and *Proctor* took no possession.] *Collard*, their vendor, had taken such possession as divests the original vendor's right to stop. *Craven v. Ryder* (c) turned on very particular circumstances, and was decided on the ground that the person holding the lighterman's receipt had control over the goods till he had exchanged it for the bill of lading.

Cowling for *Yates*. First, assuming that *Yates* is to be considered responsible for the acts of his clerk *Collard*, those acts were, under the circumstances, justifiable. But, secondly, *Yates* is not responsible for *Collard's* acts, either to the plaintiffs or to his co-defendants, because those acts all passed among those parties behind the back of *Yates*. Every thing was the act of *Collard*; *Yates* was in ignorance of all until the 18th of November. Even the delivery of the three puncheons was *Collard's* act. It is clear that the property in the goods was changed by the sale. The custom referred to is confined

(a) 6 B. & C. 107.

(b) 2 B. & C. 543.

(c) 6 Toun. 343. 2 Marsh 127. Holt, N. P. C. 100.

merely

merely to the *delivery* of goods, and the want of the delivery order is no impediment to a resale. The first question will be, whether the plaintiffs ever transferred away the right of possession. If the rum had been in their own possession, they would, by their sale to *Col-lard* on credit, have passed away both their right of property and possession: *Blosam v. Saunders* (a), per *Bayley J.* citing *Tooke v. Hollingsworth* (b). The case must be the same where the goods are in the possession of an agent, unless the contrary appear from some general usage or peculiar mode of dealing between the parties; for an agent stands in the place of his principal, *Wilson v. Anderton* (c), *Hardman v. Wilcock* (d); and although an agent is estopped from setting up the title of third persons unless they make a claim on him, he is not estopped if they do, any more than a tenant is estopped from disputing his landlord's title under the same circumstances: *Pope v. Biggs* (e). It is even doubtful whether a usage between a seller and his warehouseman not to deliver without a delivery order can be good as against the latter, when the seller has parted with his right of property and also of possession; for it is clear that an agent is justifiable in delivering goods to the person entitled to them, although contrary to the directions of his principal, and his own express promise to him: *Syeds v. Hay* (g); per Lord *Tenterden* in *Howard v. Tucker* (h); and per *Parke J.* in *Brandt v. Bowlby* (i). But the usage proved has really no application to the case. If the plaintiffs had placed their own goods in

1833.

 Dixon
 against
 Parke.

(a) 4 B. & C. 948.

(b) 5 T. R. 215.

(c) 1 B. & Ad. 450.

(d) 9 Bing. 382.

(e) 9 B. & C. 245.

(g) 4 T. R. 260.

(h) 1 B. & Ad. 715.

(i) 2 B. & Ad. 937, 938.

1833.

DIXON
against
YATES.

Yates's warehouse it would have applied, but that was not the case; and therefore the usage rather tends to shew that the plaintiffs never obtained the right of possession, but only had the right of having a delivery order accepted by *Yates*; and there is nothing in the usage to shew that they might not pass away that right without a delivery order. The usage, too, if construed as extensively as contended for, is bad in itself, as being contrary to a general principle of law, because it would put the agent in a different position, as regards the world, from his principal: *Todd v. Reid* (a). Customs encouraging trade, and merely contradicting technical rules of law, may be good; but the custom here should have been more strictly proved; it should have been expressly made out that the goods are never considered in the trade as delivered until a delivery order is accepted; or that the goods cannot be delivered without a delivery order; whereas the proof is confined to the mere mode of delivery, to the practice actually followed by warehousemen in delivering. A delivery order is not like a dock warrant, which is the symbol of property, and passes the property mentioned in it, like bills of lading or exchange. A delivery order is not a negotiable instrument; the want of it will not prevent a sale; it only passes between the owner of the goods and the warehouseman. It is never used before the goods are wanted out. It is not preserved in the warehouseman's office as a record of the title to the property. Suppose the plaintiffs had verbally authorised *Yates* to deliver the rum, and he had done so, could trover afterwards have been maintained on the ground that they had

(a) 4 B. & A. 210.

given him no written delivery order? In *Knowles v. Horsfall* (a), where the custom relative to delivery orders was more fully proved than in the present case, Lord *Tenterden* said (b), that if the plaintiff (the vendee) had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering the goods to any other order than that of the plaintiff. In fact, delivery orders seem to have been introduced to obviate the difficulty which the warehouseman might be under in knowing to whom he should deliver. Such an order, signed by the person in whose name the goods stood, would naturally be the best evidence of a right to a delivery. This is solely for the convenience and advantage of the warehouseman; but if he obtains by any other means the knowledge that the buyer is entitled to the right of possession, he will be justified in delivering to him. The invoice is sufficient evidence; and the case is the same in the present instance as if the invoice had been shewn to *Yates*; for if *Yates* is to be responsible for *Collard's* acts, *Collard's* knowledge must be taken to be his.

If, then, *Yates* may set up the rights of others, the plaintiffs' right of stoppage in transitu is extinguished by *Collard's* resale while the bills given by him were outstanding: *Davis v. Reynolds* (c). *Craven v. Ryder* (d) is distinguishable: the reason of that decision is shewn by the judgment of Lord *Tenterden* in *Ruck v. Hatfield* (e). The delivery also of the samples by the plaintiffs to *Collard* extinguished the right of stoppage; for the delivery of part is a delivery of the whole. (On

1833.

 DEXON
 agayue
 YATES.

(a) 5 B. & A. 134.

(b) 5 B. & A. 139.

(c) 1 Stark. 115. 4 Camp. 267.

(d) 6 Taunt. 433. 2 Marsh. 127.

(e) 5 B. & A. 632.

1833.

DIXON
against
YATES.

this point he referred to cases which have been already mentioned.) This is more particularly the case when the part delivered consists of samples, as in the present instance, which are intended to be carried to market, and exhibited as part of a larger quantity supposed to be in the power of the holder of them: *Hinde v. Whitehouse* (a), *Foster v. Frampton* (b). In *Cooper v. Elston* (c), and *Bloxam v. Morley* (d), the samples were not parcel of the bulk. (He also relied upon the marking of the casks, as shewing a delivery, and extinguishing the right to stop in transitu.) Besides, the plaintiffs are estopped from claiming the rum as against *Yates*, by suffering *Collard* to cooper and mark the casks, and act as the owner: they have put it in his power to commit a fraud on *Yates* and the world; and, although the master is generally responsible for the acts of his servant, he is not so responsible to another person by whose improper conduct those acts are produced. The plaintiffs contend that *Yates* is liable for allowing *Collard* to deal on his own account; but it is not found that he allowed *Collard* to use his, *Yates's*, warehouse as his own. The plaintiffs should have informed *Yates* of the sale to *Collard*. They knew *Collard* was his clerk, and had the control over the warehouse, and might commit a fraud on his master; and they put it in his power to do so by delivering the invoice, samples, &c. The plaintiffs sold to *Collard* on the same days they purchased of *Yates*, at increased profit. They, in effect, bought for *Collard* on commission. They gave him vouchers and samples, and

(a) 7 East, 558.

(b) 2 Carr. & P. 470. S. C. 6 B. & C. 107.

(c) 7 T. R. 14.

(d) 4 B. & C. 951.

allowed

allowed him to cooper, in order that he might go into the market and obtain purchasers; and, if he failed in that, they intended to reserve to themselves the power of coming on *Yates*, by keeping back the delivery orders. They never informed *Yates* of the applications made by *Collard* to them for such orders, even after the 5th of *October*, when the first bill was dishonoured. The right of stoppage ought to have been exercised within a reasonable time after they were aware of *Collard's* insolvent situation: *Green v. Haythorne*(a).

But if the plaintiffs are entitled to recover any portion, then *Yates's* co-defendants ought, as to so much, to be barred of their claims against him. They were guilty of negligence, at least, in not inquiring into *Collard's* title to the rums. The circumstances ought to have excited their suspicion, and they should have made inquiries of *Yates*, and of the custom-house officer who superintended the bonded warehouse, and who, by 6 G. 4. c. 112. s. 9., is bound to keep a transfer-book, open to the public. After dealing with *Collard* as a principal, they have no right to fall back on *Yates*, who is to be considered, as far as they are concerned, as unconnected with *Collard*. *Bond* and *Proctor* merely received the samples which the plaintiffs had left in *Collard's* possession, and which the latter had kept concealed from *Yates*. If the taking of samples, the marking, &c., are not to be considered as amounting to a delivery, and barring the right of stoppage in transitu, then neither of the co-defendants ever obtained the possession, and it is clear that they never acquired the reputed ownership: *Knowles v. Horsfall*(b).

(a) 1 Stark. 447.

(b) 5 B. & A. 154.

1833.

Dixon
v. Yates.
1833.

1833.

DIXON

negotiorum

YATES

1833.

DENMAN C. J. In this case it appears that the plaintiffs purchased 46 puncheons of rum lying in the warehouse of the defendant *Yates*, and paid for them, and thus became the owners. They sold a part of the rum to *Collard*, a clerk in the service of *Yates*, and he paid for that part by bills, which were afterwards, but before the plaintiffs had demanded possession of the rum, dishonoured. The right of property and possession thereby reverted in the plaintiffs, unless something had been done in the interval to divest them of their right of possession. While the bills were running, *Collard* had the power to take the rum into his possession, and to dispose of and sell it, but he did not exercise that power by any sufficient means. The invariable mode of delivering goods sold while in warehouses in *Liverpool*, is found to be by the vendors handing to the vendees delivery orders; and here *Collard* obtained no delivery orders except for two puncheons. It is said that the delivery of a part operates in law as a constructive delivery of the whole; but that is so only where the delivery of part is intended to be a delivery of the whole. Here that was not so; for the plaintiffs, by refusing to deliver more than the two puncheons, gave notice to *Collard* that they meant to retain the possession of the rest.

The taking of samples and cooping are circumstances from which a jury might infer an actual delivery of the whole; but that is not found as a fact in the case, and I think the circumstances do not make it incumbent on the Court to say there was such a delivery of the whole. If I had been on the jury, I should have found that there was no such actual delivery. It has been contended that the plaintiffs, after
having

having received notice of the dishonour of the bills by *Collard*, were bound to take some step to enforce their lien; but it seems to me that nothing short of an actual delivery could divest a vendor of the right to stop in transitu, which is admitted to be analogous to the right of retaining. That being so, *Yates*, then, is not able to set up as against the plaintiffs the act of any third party, and therefore is not entitled to retain the possession of the rum. It has been said that the plaintiffs cannot recover, because they have given *Collard* the means of going into the market with an apparent title to the property: the answer to that is, he had not that evidence of a transfer to him, without which any purchaser's title would have been imperfect. Under all the circumstances, I think the right of property and possession as to the 44 puncheons remained in the plaintiffs, and that they are entitled to recover.

1833.

DIXON
against
YATES.

LITLEDALE J. I think the property and right to the possession of the 44 puncheons of rum are in the plaintiffs. They sold to *Collard* a parcel of goods in *June*, and another parcel in *August*. The first parcel was paid for by two bills of exchange, which were dishonoured, and taken up by the plaintiffs to save their own credit; and those goods not having been paid for by *Collard*, he has clearly no right of property in them.

As to the second parcel; *Collard* became insolvent in *November*; the bills given by him for the goods were dishonoured. The plaintiffs, therefore (unless something had been done to prevent it, in the interval between the purchase by *Collard* and the dishonour of his bills), might resume possession and prevent the delivery.

The

1835.

~~Dutton~~
~~against~~
~~Yates~~

The only question is, whether, in the interval, any thing of that nature was done by *Collard*. The invariable mode of delivering goods sold while they are lying in warehouses at *Liverpool*, is by the vendor handing delivery orders to the vendee. The plaintiffs had not given to *Collard* orders for the rum in question, therefore there had not been a delivery to him in the usual mode. Had he, then, acquired the possession (as he undoubtedly might) in any other way? An invoice was delivered. In the case of any sale of goods, the common course is for the vendor to deliver to the vendee an invoice, but that does not vest the actual possession of the goods in the vendee. The delivering of the invoice, therefore, did not give *Collard* any colourable title. Then, after receiving the invoice, *Collard* coopered and marked the casks. The coopering was an act which might be done in order to ascertain that the casks were in proper order. The marking of the casks with his initials is an act which looks much more like taking possession. But *Collard* knew at the time that he had no delivery order. He was a clerk to *Yates*, and had the management of his cellar, and full power to mark and gauge the casks as he pleased. If that act had been done with the approbation of *Yates*, the latter knowing that *Collard* had bought the rum, it might have been sufficient to vest the actual possession in the latter. But that was not so. It seems, therefore, to me that *Collard* had not done sufficient to take the possession: and then, the bills having been dishonoured on the 1st of *September*, the plaintiffs were entitled to retain.

It remains to be considered whether the fact of *Collard* having sold part of the rums to *Kaye*, and to *Bond* and

and *Proctor*, and the acts done by them, make any difference. It is a general principle of law, that a man who has not the property and right of possession in goods cannot transfer them to a vendee; and, therefore, if the original vendor chooses to retain or stop in transitu, a second vendee is in no better situation than the first. Then it is said there was a part delivery here, and that that, in point of law, operated as a constructive delivery of the whole. But that rule is confined to cases where the delivery of part is intended to be a delivery of the whole: *Bunney v. Poyntz* (a), *Simmons v. Swift* (b). On the contrary, there was in this case an express refusal to deliver the whole.

There are two general principles of law which must decide the present case; the one is, that so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them; and if they remain in the possession of his agent, i. e. a warehouseman or carrier, he may stop them. The other is, that a second vendee of a chattel cannot stand in a better situation than his vendor.

PARKE J. I am of the same opinion. No doubtful principle of law is involved in this case. The question is, what inferences ought to be drawn from the facts given in evidence; and, particularly, whether there has been a delivery of the 44 puncheons of rum to *Collard*, or of 18 puncheons to *Bond* and *Proctor*, or 26 to *Kaye*? Those are questions of fact. The issue is, whether the plaintiffs are entitled to the property in, or to the right of possession of 44 puncheons of

(a) 4 B. & Ad. 568.; not reported when this case was argued.

(b) 5 B. & C. 857.

1893.

Dixon
against
Yates

rum marked and numbered as stated in the issue, and being in the warehouse of the defendant *Yates*. *Col-lard* purchased of the plaintiffs. *Kaye*, *Bond*, and *Proctor* are sub-purchasers. It is clear that the plaintiffs were, originally, entitled to the goods. An invoice was made out to them, and the price was paid by them. I take it to be clear that by the law of *England* the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in *Bailey v. Culverwell* (a), 2 *Mann. & Ry.* 566., in a note by the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.

The defendant *Yates* is a warehouseman, and therefore may set up the *jus tertii*; then the question is, whether any third persons are entitled? The plaintiffs parted

(a) See *Com. Dig. Biens*, D. 3.

with the property in the goods. They sold to *Collard*, but he did not take actual possession. There was no delivery order, nor was the rum delivered to him. The whole quantity sold to him in *June* and *August* was paid for by bills, three of which were dishonoured before the plaintiffs demanded the possession, and one bill afterwards; and *Collard* had become generally insolvent before the demand was made. It is said that *Collard* is entitled to the property in the goods; but the plaintiffs were vendors retaining the possession, and every vendor has a lien until he is paid. It is true that their lien was suspended as long as the bills were running; but it revived as soon as they were dishonoured. On the 16th of *November* *Collard* had dishonoured three bills, and had become insolvent, and was known to be so. The lien of the vendors then revived. If they had parted with the actual possession, and the goods had remained in the hands of a carrier, they would have been entitled to stop them in transitu, unless the sub-purchasers from *Collard* had taken actual possession, and not having parted with the possession at all, they have a right to retain it under the same circumstances.

If, indeed, *Collard* had taken possession of these goods, then the plaintiffs' right was at an end. It is true he had taken samples; but they were not part of the bulk of the commodity to be delivered. Then it is said that by taking possession of the two puncheons, he took possession of the whole; but it is clearly established, that if part be delivered with an intent to separate that part from the rest, it is not an inchoate delivery of the whole, so as to divest the right of property out of the vendor. Here the vendors, on being
asked

1833.

Dixon
against
Yates.

1833.

 DIXON
 against
 YARR.

asked to give a delivery order for the whole, said they would give an order for one or two puncheons only; thereby separating that part distinctly from the rest. As to the marking; that is an equivocal act: it may be for the purpose of taking possession, or merely for that of identifying the property. Besides, here it is proved that the invariable mode of delivering goods sold while they are in warehouses at *Liverpool*, is by giving the vendee a delivery order. I agree that, notwithstanding such custom, there may be a delivery by some other mode. The absence of a customary order, however, is a strong circumstance to shew that possession was not intended to be delivered, where the acts relied upon to shew that possession was taken, are equivocal. These are all the facts of the case, as far as they relate to *Collard*. Then it is said that *Collard* sold 26 puncheons to *Kaye*, and 18 to *Bond* and *Proctor*, that possession has been taken by them, and the lien of the plaintiffs was thereby divested. *Kaye* coopered and gauged the casks. Now, gauging is an equivocal act; it might be done to ascertain the quantity contained in them, before he paid for them. Coopering is an act much more like taking possession; and it is the only part of the case upon which I have entertained any doubt. But when we consider that it was objected to at first, and until *Collard* interfered; and that a delivery order, which is the usual mode of transferring property from vendor to vendee, at *Liverpool*, was wanting in this instance,—I think we ought not to come to the conclusion that *Kaye* took possession, merely because he coopered and gauged the casks. As to *Bond* and *Proctor*, the case is less strong, for they never coopered or gauged. Then there was no delivery

delivery to the sub-vendees; and the rule is clear, that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee under whom he claims. He gets the title defeasible on non-payment of the price by the first vendee: *Craven v. Ryder* (a). There is no question on these propositions of law. The only difficulty is one of fact,—whether there was a delivery or not. It being thus established that *Yates* is liable to the plaintiffs, another point arises; and that is, whether he has made himself liable by his own conduct to the sub-purchasers also. If he had undertaken to deliver to them, or represented to them that they were the goods of *Collard*, and they had acted on the faith of that engagement or representation, he might be liable to them; but there is nothing to shew that. As to *Bond* and *Proctor*, nothing of the sort took place; and, with regard to *Kaye*, the only circumstance is, that he was allowed to gauge the casks: but it would be going very far to say, considering the circumstances under which it took place, that this was an admission by *Yates* that *Kaye* might have full possession whenever he pleased; nor does it appear that *Kaye* was induced to alter his condition in consequence. Therefore he, as well as *Bond* and *Proctor*, is without remedy against *Yates*.

1833.

 DIXON
against
YATES

PATTERSON J. The question to be decided in this case is one rather of fact than of law. The only doubtful point is, whether possession of the goods has been taken by *Collard* or his sub-vendees. We are empowered by the case to draw from the facts the same

(a) 6 Tamm. 433. 2 Marsh. 127.

inference

1833.

DIXON
against
YATES.

inference which a jury might. Now it appears that *Yates* sold the goods to the plaintiffs, and they paid for them. The property thereby was transferred to them, and when they sold, it was in like manner transferred to the sub-vendee, subject to the right of stoppage in transitu. The sale to the plaintiffs placed *Yates* in the situation of warehouseman to them. It is found to be the invariable mode of delivering goods sold, while lying in warehouses at *Liverpool*, for the vendor to give the vendee a delivery order on the warehouseman. The difficulty in this case arises from that circumstance, and also from *Collard's* filling two characters, that of clerk to *Yates*, and that of purchaser. If there had been transfer books, and the transfer had been into *Collard's* name, he might have made a good title to the sub-purchasers; but here the goods remain with the warehouseman in the name of the first purchasers, although there may be twenty different changes of property. The acts relied on to shew that *Collard* took possession are, that he had samples, and that he coopered and gauged the casks; but the rums were sampled on the quay when landed, and the samples were clearly no part of the bulk sold. If the coopering had been by a purchaser from the plaintiffs, who was wholly unconnected with *Yates*, and who had been suffered by *Yates* to cooper the casks in the warehouse, I am not prepared to say that that would not have been an act of ownership from which I should have inferred a delivery to, and an actual possession by *Collard*. But he was *Yates's* clerk, and had the control over his cellar, and coopered the casks immediately after he had made the purchase. The plaintiffs refused to give him a general delivery order; they could not do a more deliberate act to shew that they did not intend to give him
the

the actual possession. The cooping was referable rather to his character of clerk to *Yates*, than to that of a purchaser from the plaintiffs; and, if so, it was not a taking possession by him. Then, it is said, the resale to *Bond* and *Proctor*, and to *Kaye*, alters the case, because they have paid *Collard*; but that is immaterial, except so far as it would prevent *Collard* (as against them) from stopping in transitu. But it does not divest the original vendor of his right to stop in transitu: *Craven v. Ryder* (a). *Collard*'s bills having been dishonoured, the plaintiffs were clearly entitled to retain: *Davis v. Reynolds* (b). The act of cooping by *Kaye*, therefore, as against the plaintiffs, can have no greater effect than the act of cooping by *Collard*. Then, as between *Yates* and *Kaye*, a question arises whether the property was vested in *Kaye*, the sub-purchaser, as against *Yates*. It appears that *Kaye*, after *Yates*'s other clerk had refused to allow him to cooper the puncheons, obtained permission of *Collard* to do so. Now, here again, the difficulty arises from the fact of *Collard* being both seller of the rums to *Kaye*, and servant to *Yates*. If he had been a person wholly unconnected with *Yates*, the act done by him would only have been referable to his character of seller. And if *Collard* had not been the seller, and *Kaye* had been suffered by *Collard*, as the clerk of *Yates*, to cooper the casks, *Yates* might have been bound by his act. But here *Kaye* knew *Collard* to be the seller of the rums, and, knowing also that the other clerk of *Yates* would not allow him to cooper the casks, he applied for and obtained permission of *Collard*. The latter, therefore, must be considered as

1833.

DIXON
vs. DIXON
21st
TATEL.

(a) 6 Tourn. 433. 2 Marsh. 127.

(b) 1 Stark. 116. 4 Camp. 267.

1833.

DIXON
against
YATES.

having acted in his character of purchaser and seller, and not of clerk to *Yates*. *Yates*, therefore, is not bound by his act as the act of an agent, but *Kaye* must take the consequences of the acts of *Collard*; and, consequently, the property was not in *Kaye* as against *Yates*. The plaintiffs are therefore entitled to judgment.

The judgment was given generally for the plaintiffs; but, on application afterwards made, it was referred to *Parke J.* to order specially at chambers, how the judgment should be drawn up.

By a rule of Court of *Hilary* term 1834, reciting the rule for judgment, and an order made by *Parke J.* on the 23d of *December*, whereby it appeared that the rum claimed by *Kaye*, *Bond*, and *Proctor*, had been delivered to the plaintiffs, and their costs paid by the defendant *Yates*, it was ordered, that *Yates* should be discharged from all claim by the plaintiffs in respect of the damages and costs in the postea, costs, and all the other matters in issue. And, after reciting further, that the Master had been, by the above order, directed to tax the costs of the defendant *Yates* for preparing the brief or briefs (as he might think fit) for the trial, and of one witness, such brief or briefs to be such as ought to have been prepared and given for the purpose of making out *Yates's* defence as to the three puncheons of rum, and as to the alleged acts by which it was contended that he would be personally liable to the plaintiffs though the other defendants should not be, and also the costs of *Yates's* appearing by counsel, and arguing the special case, on the like principle; and reciting the Master's allocatur for 3*4*l. 1*3*s. 8*d.*, it was ordered, that the said costs should be

be paid by the plaintiffs to *Yates*. And, after resiting also, that the Master, by the said order, was further directed to tax the costs of the defendant *Yates* of the action brought against him, of his application to interplead, and of this cause, and that it appeared by the Master's allocatur that he had taxed them at 163*l*. 16*s*. 4*d*., it was further ordered that the defendants *Kaye*, *Bond*, and *Proctor* should pay the same, together with the costs paid by the defendant *Yates* to the plaintiffs (after giving credit for the said costs to be paid by the plaintiffs, when received, to *Yates*,) upon a pro rata according to the value of the goods respectively claimed by them, (but not including the three puncheons of rum delivered to the defendants *Bond* and *Proctor*,) to be settled by the Master in case of difference; and in case the said monies should not be received from the plaintiffs at the time when the respective amounts to be paid by the other defendants should be ascertained, that the same when received by the defendant *Yates* should be paid over to the other defendants in like proportion, to be settled in like manner in case of difference.

1838.

 Dixon
against
Yates.

The KING *against* HOLDEN and Another.

 Saturday,
June 8th.

THE defendants, in *September* 1832, were charged before two justices with an unnatural crime, said to have been committed within the liberty of *Bury St. Edmund's, Suffolk*. They were discharged on giving

An indictment found at the *Suffolk Lent assizes* 1833, on a charge of felony preferred in *September* 1832,

was removed into K. B. by certiorari, and a motion made to award a venire into another county, on a suggestion that a fair trial could not be had in *Suffolk*; in support of which application many affidavits were put in, sworn in the autumn of 1832, shewing that a strong prejudice existed in *Suffolk* against the defendants, on the subject of this charge.

The Court held, that there were not sufficient grounds laid for removing an indictment from the body of a large county, and discharged the rule.

1833.

The King
against
HOLDEN.

bail for their appearance at the *Suffolk* Lent assizes 1833, at *Bury*. In *Michaelmas* term 1832, Sir *James Scarlett* obtained a rule absolute in the first instance, for a certiorari to the justices of oyer and terminer for the county of *Suffolk*, to remove into this Court any indictment that might be found against the defendants, or either of them, at the next assizes for the said county. A bill was found against the defendants at the Lent assizes for a capital felony. Before the bill was returned, or the certiorari served, an application had been made to the learned Judge sitting on the crown side at the assizes, to call the defendants on their recognizances, which was done and the recognizances estreated. The certiorari being afterwards served, the defendants put in fresh bail in this Court before a Judge at chambers, and the estreated recognizances were then discharged, the prosecutor making no opposition. The defendants pleaded to the indictment in this Court; and, in *Easter* term, Sir *James Scarlett* moved for a rule to shew cause why a suggestion should not be entered upon the roll, that a fair and impartial trial of the issue joined in this prosecution could not be had by a jury of the county of *Suffolk*, and why the said issue should not be tried by a jury of the county of *Kent*, or of such other county as this Court should direct. It was stated that the liberty of *Bury St. Edmund's* comprehends nearly half the county; and that, by the ordinary practice, the defendants, being indicted for an offence committed within the liberty, would be tried by a jury from thence. In support of the present application many affidavits were referred to (sworn in the autumn of 1832, and used upon the application for a certiorari), shewing that a strong prejudice existed in the county against the defendants

defendants on the subject of this charge, and stating the belief of the deponents that it could not be fairly and impartially tried in *Suffolk*.

1838.

—
The King
against
HOLLIS.

Byles now shewed cause. It is admitted that the Court has power to award a venire into a foreign county on a proper suggestion. On the removal of an indictment by certiorari, and plea of the general issue, the trial, at common law, would be at bar, by a jury of the county. A writ of nisi prius may indeed issue, by consent of the Attorney-General (2 *Inst.* 424.); but still it must go into the proper county, unless there be a suggestion of the nature here applied for, which estops both parties. Yet, although the Court may award a venire into a foreign county by means of a suggestion, no instance can be found in which such a power has been exercised at the defendant's instance in a case of capital felony, where the trial would be by a jury of the county at large before a Judge of one of the superior Courts. Many inconveniencies would attend such a proceeding. The removal by certiorari from the Court below, where the party is on bail, discharges the defendants' recognizances, *Rex v. Richardson* (a), and those of their bail; and that would have been the case here, if the parties had not been called on their recognizances before the writ was served. It also discharges the recognizances of the prosecutor and witnesses. The prosecutor cannot claim costs from the county under 7 G. 4. c. 64. ss. 22, 23., *Rex v. The Exeter County Treasurer* (b), *Rex v. Richards* (c), *Rex v. Johnson* (d); and the removal to another county must neces-

(a) 2 *Leach's C. C.* 560.(b) 5 *M. & R.* 167.(c) 8 *B. & C.* 480.(d) 1 *Ry. & M.* 173. 616.

1893.

The King
against
Holden.

sarily increase expense, as well as delay the proceedings. There is no provision by law for the expense of reconveying the defendants, if convicted, to the original county. The statute 27 G. 2. c. 3. does not apply. As to the prejudice apprehended, that must have now abated; and, since the indictment has been removed into this Court, the jury will be taken from the county at large, (6 G. 4. c. 50. s. 13.) and not from the liberty, to which the allegations of prejudice in the affidavits chiefly apply. In *Rex v. Mead* (a), an application for a certiorari to remove an indictment for murder, in order that it might be tried in a different county from that in which the bill had been found, was rejected by this Court. The same appears to have been done in *Rex v. Elford* (b). In *Rex v. Thomas* (c), an indictment for murder was removed into this Court, on application made on behalf of the defendant, but that was from the sessions for the city of *Rochester*, an inferior and comparatively limited jurisdiction. And so in *Rex v. Fawle* (d), where a certiorari was granted, the removal was from the sessions, and the felony does not appear to have been capital. An application of this kind for a suggestion was made without success, in *Rex v. Penprase and Others* (e), in last *Hilary* term. [Littledale J. That case was tried at Nisi Prius. So also was *Rex v. Ellis* (g), where the bill had been found at the gaol delivery for the city of *Exeter*, and was removed into this Court by certiorari. Patteson J. There was a similar case at *Maidstone*, last assizes.] The prosecutor might further contend that he was entitled to have the certiorari quashed, as having

(a) 3 D. & R. 301.

(c) 4 M. & S. 442.

(e) 4 B. & Ad. 575.

(b) 2 Str. 877.

(d) 2 Ld. Ray. 1452.

(g) 6 B. & C. 145.

been obtained without any rule to shew cause, and without notice to him, contrary to the usual practice, *Rex v. Fawle (a)*, *Rex v. The Duchess of Kingston (b)*, *Rex v. Thomas (c)*, *Rex v. Hunt (d)*, *Hawk. P. C.* book ii. c. 27. s. 27. But it is not desired to quash the certiorari, or discharge the present rule, if the defendants be put under such terms as to costs as will leave the prosecutor in no worse situation than if the case had been proceeded upon in the ordinary way. There is no legislative enactment on the subject, but an analogy may be drawn from the statutes 5 & 6 *W. & M.* c. 11. s. 3. and 38 *G. 3.* c. 52. s. 8.: and terms of this kind were imposed on the defendants in *Rex v. Hunt (e)*, and in the late case of *Rex v. Hodgson (g)*, where the place of trial was changed, by suggestion, upon indictments for misdemeanor. The reasonable costs to be paid to the prosecutor in this case, would be those already incurred; the costs of the trial in any event, with the addition of those occasioned by the removal; the costs in this Court, including those of the present application; the costs of reconveying the defendants, if convicted, to the original county; and any others which the prosecutor may incur after the judgment. [*Denman C. J.* The costs of the trial must be in the discretion of the Judge who tries the indictment; and they are not payable by the defendant, but by the county.] Supposing that the terms required by the prosecutor were granted, many inconveniencies might still arise if the Court were to remove the case to a different circuit; as, for instance,

(a) 2 *Ld. Ray.* 1452.(b) *Comp.* 283.(c) 4 *M. & S.* 442.(d) 3 *B. & A.* 444.(e) *Hilary term* 1820.(g) *Hilary term* 1831. Indictment for misdemeanor. Suggestion, for trying the issue in *London* instead of *Yorkshire*.

1833.

 The KING
 against
 HOLDEN.

1833.

The King
against
Holden.

in case a witness were to die, the difficulty of obtaining the depositions, which are now in the legal custody of the clerk of assize of the *Norfolk* circuit.

Sir *James Scarlett* and *B. Andrews* contra. With respect to costs, the defendants will accede to any terms the Court may think proper; and the depositions may, without difficulty, be removed into this Court. There is nothing new in the trial of felonies at nisi prius. The statute 14 *Hen. 6. c. 1.*, enabling justices of nisi prius to give judgment of a man attainted or acquitted of felony, conferred upon them no new jurisdiction as to trying, but was only passed in order that they might give judgment as well as try, which before they could not do; and that statute shews that they might even try cases of treason. The power of removing cases of felony exists at common law, and is part of the supreme jurisdiction belonging to this Court, though not exercised unless under very special circumstances. But it has been exercised, even at the instance of defendants. *Rex v. Thomas (a)* is a decisive authority on this case. No difference can be shewn in principle between removing a case of felony and one of misdemeanor: in the discretion of the Court, they may not be viewed alike, but there is no rule of law confining the trial of felonies to the proper county, which would not equally extend to misdemeanors. A case of felony was lately removed from the sessions for the town and county of *Southampton (b)*. [*Patteson J.* An application was there made before me in the bail-court for a certiorari, and I thought I could not grant it, as the case arose in a

(a) 4 *M. & S.* 442.

(b) *Rex v. Russell*, 4 *B. & Ad.* 576. note (a).

town which was a county of itself, and therefore a particular course of proceeding was directed by 38 G. 3. c. 52. But the prosecutor undertook, upon terms, to try in the county at large.] The indictment in *Rex v. Ellis* (a) was removed by certiorari from the city of *Exeter* into the county of *Devon*. [Denman C. J. There is a provision in 38 G. 3. c. 52. s. 10., that the statute shall not extend to the criminal jurisdiction of *Exeter*, unless in cases of indictment removed from thence into the King's Bench by certiorari.] That leaves the jurisdiction of the King's Bench as it stood at common law, and by that jurisdiction the indictment in *Rex v. Ellis* was removed; the ground being that an impartial trial could not be had in the city. In *Rex v. Thomas* (b) the place of trial was changed from the town of *Rochester* to the county of *Kent*. In *Rex v. Mead* (c) the Court would have removed the indictment (which was for murder), or granted a trial at bar, but for the special circumstances. And on principle, if an indictment for misdemeanor may be removed on the ground of prejudice, à fortiori, a case of felony ought to be so removeable, where even the life of the party may be at stake. The Court has, from the earliest times, exercised a power of removing civil causes into counties where the ground of action did not arise, and this, not because such cases are, for this purpose, distinguishable from others, but by reason of the general jurisdiction which the Court possesses, to dispense justice throughout the country. The form of suggestion, in a case of misdemeanor, is given in *Rex v. Hunt* (d): the county to which the removal is made, is stated to be the county.

(a) 6 B. & C. 145.

(c) 3 D. & R. 301.

(b) 4 M. & S. 442.

(d) 3 B. & A. 444.

1833.

The King
against
Holden.

next

1888.

—
The King
against
Holmes.

next adjoining. [*Denman C. J.* In a case from *Nottingham (a)*, *Kent* was suggested, by consent, to be the next adjoining county. *The Solicitor-General*, *amicus curiæ*, in the *Bristol case (b)*, *Berkshire* was suggested to be the next adjoining county.] On the suggestion here offered, a trial at bar might be ordered, if necessary. The argument of inconvenience was urged in *Forewether's case (c)*, where a certiorari had been awarded to the justices of assize of *Suffolk*, to remove an indictment against a justice of that county for common barratry; and upon discussion as to a rule for a trial at bar, and motion made on behalf of the crown that it should be tried in the county, *Keeling*, clerk of the crown, said, "That divers precedents have been of such trials, upon indictments in banco, without any consent of the parties, and against the will of the prosecutors, and in more remote counties;" which appears to be approved of by the Court.

DENMAN C. J. I apprehend that the power of changing the place of trial whenever it is necessary for the purpose of securing, as far as possible, a fair investigation, is a part of the jurisdiction of this Court; and that that power may be exercised, where it is absolutely necessary, in cases of felony. Instances have occurred in which this has been done for the purpose of removing the trial from limited jurisdictions; but there does not appear to be any in which it has been done with respect to a county at large: and I should think such a proceeding could not be necessary where the removal must be from one great county to another. Where it

(a) *W. Sacheverell's case*, 10 *Howell's State Trials*, 30.

(b) *Ree v. Pinney*, 3 B. & Ad. 947.

(c) *Cro. Car.* 348.

has happened on indictments for misdemeanor, the circumstances have almost amounted to a necessity. In the *Nottingham* and *Bristol* cases, the inhabitants themselves were parties, or had a strong interest. In *Rex v. Hunt* (a), the magistracy and yeomanry of the county of *Lancaster* were affected; and, in *Waddington's* case (b), the misdemeanor, which was the subject of indictment, had prevailed extensively in the county of *Kent*. But here, upon full consideration, I think no such case of necessity appears, even if the indictment were for misdemeanor only. It seems, indeed, that some of the magistrates have committed themselves upon the subject; but there is nothing to shew that the great body of freeholders and others, out of whom the jury would be formed, are likely to be prejudiced, except by those feelings which arise from the nature of the offence, and which are common to all counties. When men are summoned into a jury-box to decide upon a case of felony, such prejudice is very apt to die away: it is a kind of feeling which juries are learning more and more to lay aside; and we should rather relax that disposition by being too ready to suppose that they would be influenced by unjust impressions. Objections have been suggested in point of form; and it is true that the Court might, by granting such a rule as this, expose itself to frequent solicitations of the same kind: still, if I thought it necessary for the purpose of securing a fair trial, I should certainly be disposed to grant this application. But, considering the time which has now been afforded for prejudice to die away, and feeling a perfect persuasion that, with the right of challenge and the benefit of

1833.

The King
against
HOLMAN.

(a) 3 B. & A. 444.

(b) See 1 East, 167., and 3 B. & A. 446.

1838.

—
The King
against
Holden.

selection from so large a county, the defendants may find an unprejudiced jury in *Suffolk*, I am of opinion that the balance of convenience is against this application; and I do not apprehend the least real danger of any prepossession in those, who, by the natural course of the constitution, are appointed to try this indictment. The rule will therefore be discharged.

LITTLEDALE, PARKE, and PATTESON Js. concurred.

The following rule was drawn up as to costs:—
“That the rule be discharged with costs, to be paid by the defendants to the prosecutor or his attorney, such costs to be taxed by the coroner and attorney of this Court. And it is further ordered, by consent of counsel on both sides, that the said defendants pay to the prosecutor or his attorney his costs in this Court, to be taxed; and do, within a week next following, give security to the satisfaction of the coroner and attorney of this Court, for the payment of such costs to the said prosecutor, as the Judge, before whom the issue joined in this prosecution shall be tried, shall think the said prosecutor entitled to receive.”

The defendants were tried at *Nisi Prius* at the next assizes for *Suffolk*, by a jury of the county, who returned a verdict of Not Guilty.

1838.

FIELD *against* BEZANT, Gent., one, &c.Saturday,
June 8th.

ASSUMPSIT on promissory notes, &c. Plea, general issue, and notice of set-off. At the trial before *Denman* C. J., at the *London* sittings after last *Michaelmas* term, the plaintiff proved a debt due to him upon several promissory notes, amounting to 333*l.* 6*s.* 8*d.* The defendant claimed to set off his bill of costs. It appeared that this originally amounted to 775*l.* 1*s.* 9*d.*; but, on reference to a Master in Chancery for taxation, was reduced to 422*l.* 7*s.* 2*d.*, being less than five-sixths of its original amount: the plaintiff then applied to the Master of the Rolls for a taxation of his costs of taxing the defendant's bill, and the Master of the Rolls thereupon ordered that the bill should be referred back to the same Master in Chancery to tax the last-mentioned costs, and that the defendant should allow and give credit to the plaintiff for the amount of such costs, when taxed, against and in reduction of the sum of 422*l.* 7*s.* 2*d.* certified to be due to him. The Master taxed the plaintiff's costs of taxation at 118*l.* 7*s.* 10*d.*, which, if it could be deducted in this action from the sum of 422*l.* 7*s.* 2*d.*, would reduce the defendant's claim to 303*l.* 19*s.* 4*d.* The Lord Chief Justice was of opinion, that the defendant could set off the latter sum only, and a verdict was entered for the plaintiff for 29*l.* 7*s.* 4*d.* A rule nisi had been obtained for setting aside this verdict, and entering a verdict for the defendant, on the ground

Where an attorney, defendant in assumpsit, sets off the amount of his bill, the plaintiff cannot deduct from that set-off, costs of taxation allowed against the attorney, pursuant to 2 G. 4. c. 23. s. 23.

1893.

 FIELD
 against
 BRANT.

ground that the costs of such taxation could not be made the subject of an action or of set-off.

Platt and *W. H. Watson* now shewed cause. The defendant was not entitled to set off the whole amount of his bill. [*Parke J.* The only question is, whether the costs of taxation constituted a debt, which alone is the subject of an action or set-off.] It is part of the order of the Master of the Rolls that the defendant should allow and give credit to the plaintiff for the amount of the costs when taxed. Those costs thereby became a debt due to the plaintiff.

LITLEDALE J. A party can set off only such sums as can be made the subject of an action. Here the plaintiff could not have brought an action to recover his costs of the taxation of the defendant's bill; he could only enforce his claim by an attachment.

PARKE and **PATTESON Js.** concurred.

Rule absolute. (a)

(a) See *Fry v. Malcolm*, 4 Taunt. 706. *Emerson v. Lashley*, 2 H. Bl. 248.

1839.

STOW *against* DAVENPORT.*Monday,*
June 10th.

ASSUMPSIT for money paid by the plaintiff for legacy duty in respect of an annuity of 500*l.* bequeathed to the defendant's wife. At the trial, before Lord Tenterden C. J., at the sittings in *London*, after *Trinity* term 1832, the plaintiff had a verdict for 1000*l.*, subject to the opinion of this Court upon a special case, which was stated in substance as follows.

In 1811 *Thomas Frisby* devised all his real estate to trustees, in trust to convey the same to the use of his son, *T. F.* the younger, for life, remainder to themselves, to preserve contingent uses, &c.; and, after his death, in case *Mary Ann Frisby*, his then wife, should survive him, to the use that she *should take from and out of the same premises such annuity, or yearly rent-charge, not exceeding 500*l.* a year for her life, as T. F., jun., should by will appoint, the same annuity to be paid her, clear of all taxes and deductions whatsoever*, by four quarterly payments; remainder, in default of issue of *T. F.*, jun., to the plaintiff for life, charged with the annuity above mentioned. He also bequeathed all his personal estate to his executors, upon trust to convert the whole into ready money, and lay it out in the purchase of real property, to be conveyed to the uses above stated, with power to them to place out such personal estate in the public funds, &c. till such purchase could be effected; the dividends to go to the same persons for whose benefit the purchase was to be made.

The testator died in 1811. In 1813 *T. F.*, jun., and the plaintiff joined in a conveyance of the devised lands

Lands were devised, to the use, among others, that *M. A. F.* should take, *from and out of the same premises, an annuity or yearly rent-charge of 500*l.* a year, to be paid clear of all taxes and deductions, remainder to S. for life, subject to the annuity:*

Held, that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently that *S.*, who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity, pursuant to 45 G. 3. c. 28. s. 5., could not recover it again from the annuitant.

to

1833.

Stow
against
DAVENPORT.

to a trustee, his heirs and assigns, to the use of *T. F.*, jun. for life, and to the use that after his decease, his said wife, if she should survive him, might receive out of the same premises such annuity, or yearly rent-charge, not exceeding 500*l.* a year, clear of all taxes and deductions whatsoever, as the said *T. F.*, jun. should by will appoint. He by his will appointed that the annuity should be of the full annual amount of 500*l.*; and he died in 1820. The plaintiff entered into possession of the lands, and into the receipt of the dividends arising from the personal estate, paying the annuity to the widow of *T. F.*, jun. In 1830, an information, of which the defendant had notice, was filed by the Attorney-General against the plaintiff for non-payment of the legacy duty on the said annuity; and judgment was thereupon entered up for the crown for 709*l.* 15*s.*, the amount of duty, and 38*l.* 9*s.* 8*d.*, costs of the crown. The present action was brought to recover this sum of 748*l.* 4*s.* 8*d.* from the defendant, who had married the widow, *Mary Ann Frisby*. The estates upon which the annuity was charged were subject to land-tax and other charges. This case was argued in *Easter* term (*a*).

Kelly for the plaintiff. The questions are, first, whether or not this annuity was subject to the legacy duty; and, secondly, if it was, whether the duty ought to be paid by the annuitant, or by the devisee of the land? On the first point, *The Attorney-General v. Jackson* (*b*) is decisive. With respect to the second, the cases in equity which have turned upon the question, whether or not the legatee was exempt from legacy duty, do not

(*a*) Before *Denman C. J.*, *Littledale*, and *Parke Js.*

(*b*) 2 *Cro. & Jer.* 101. 2 *Tyr.* 50.

apply

apply here, the dispute in this case being between a tenant of the land who has paid this legacy duty, and the legatee upon whose legacy it is chargeable. If the latter is free from the duty, the legacy to him is of a larger sum than the amount of the annuity, and he is entitled to the additional sum out of the surplus of the estate. If there be no surplus, he must pay it. In the meantime, by the statutes 36 G. 3. c. 52. and 45 G. 3. c. 28. (a), the tenant, in a case like the present, is liable in the first instance; but it is a debt to the crown, payable

1833.

Stow
against
DAVENPORT.

(a) 36 G. 3. c. 52. s. 6. enacts, That the duties imposed by this act shall (where it is not otherwise provided) be paid by the executor or administrator, upon *retainer*, for his own benefit or that of others, of any legacy, residue, &c. which he shall be entitled so to retain in his own right, or that of others, and also upon *payment* or other satisfaction of any legacy, &c. to which any other person shall be entitled; and if such executor or administrator shall so retain any legacy, &c., not having first paid the duty, or shall pay such legacy, &c., having received or deducted the duty chargeable thereupon, such duty, being unpaid to His Majesty, shall be a debt of such executor or administrator to His Majesty: — “ And in case any such person, so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to His Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to His Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made.”

By 45 G. 3. c. 28. s. 5. it is enacted, “ That the duties hereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues, of any such monies, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons entitled to such real estate, subject

1893.

Stow
against
DAVENPORT.

able by the legatee; and the tenant, having been obliged to pay it, may recover against the legatee, who, if the legacy be free from duty, may in his turn file a bill against the executors for the amount which he has been so compelled to pay. If this were not so, the tenant would be without remedy: he could not sue the executors; and he could not recover against them by bill in equity, unless there were a residue. The reasoning of *Dallas C.J.* upon the statutes in *Hales v. Freeman* (a) applies to this case. It must be contended, on the other side, that, in addition to the land-tax, sewers' rate, and other such burdens, which properly fall upon the tenant, he is also liable to the legacy duty on any personal annuity charged upon the land. The bequest of an annuity "clear of all taxes and deductions" is a bequest of the annuity and legacy duty; but it does not follow that the duty is to be charged on the land, in addition to the annuity. [*Littledale J.* Suppose there is no residue in the hands of the executors?] The legatee is debtor to the crown, and the legacy must be reduced so as to provide for the duty. It would be like the ordinary case of a proportionate reduction where there are not sufficient assets to pay every legacy.

Thesiger, contra. It must be admitted that the present case does not materially differ from *The Attorney-General v. Jackson* (b), but the object of the defendant

to any such legacy; or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in an act passed, &c. (36 G. 3. c. 52.)

(a) 1 B. & B. 391.

(b) 2 Cro. & Jer. 101. 2 Tyr. 50.

is to have that case reviewed. The 500*l.* a year, upon which this duty is claimed, is not a "legacy out of or charged upon the real estate" within 55 G. 3. c. 184. sched. part iii., nor an annuity "charged upon or made payable out of" the real estate, within 45 G. 3. c. 28. s. 4.; but it is a rent-charge executed in the party from whom the duty is now demanded. It is a portion of the real estate. A rent-charge issues out of the land. An annuity, properly so called, charges the person of the grantor only; *Co. Litt.* 144. *b.* Here no person is charged; the land only is looked to. [*Parke J.* Is not this within the words of 55 G. 3. c. 184. sched. part iii., "all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate," &c. ?] After the decision in *The Attorney-General v. Jackson* (a), it is certainly difficult to say that the legacy duty did not attach in this case. [*Denman C. J.* I think the two cases cannot be distinguished.] Then the next question is, whether, by the words "clear of all taxes and deductions whatsoever," the annuity is given to the legatee free from legacy duty. On this point *Barksdale v. Gilliat* (b), *Dawkins v. Tatham* (c), and *Smith v. Anderson* (d), are direct authorities for the defendant. The argument used in the last of these cases, that if the legacy duty were not referred to by the words "without any deduction," there appeared nothing else to satisfy those words, will apply more strongly here. In *Hales v. Freeman* (e), where the annuity was left "clear of all deductions," it was certainly taken for granted that the

1833.

Stow
against
DAVENPORT.

(a) 2 Cro. & Jer. 101. 2 Tyr. 50.

(b) 1 Swanst. 562.

(c) 2 Sim. 492.

(d) 4 Russ. 352.

(e) 1 B. & B. 391.

1833.

Stow
against
DAVENPORT.

legatee was liable to the duty ; but (as the Master of the Rolls observes in *Smith v. Anderson*(a)) “ it appeared that these words were not noticed by either the bar or the bench, and that the argument and decision in that case proceeded upon a totally distinct ground.” Then, thirdly, the question is, if the legacy be free from duty, by whom the duty must be paid ? Whether by the plaintiff, or whether he, having paid it, may resort to the legatee ? Now, this kind of charge upon the devised lands is not within the meaning of 45 G. 3. c. 28. s. 5. : it is not a legacy for which the tenant could “ retain ” the duty, according to that statute. The party interested might either have received it from the tenant, or distrained upon the land for it, by 4 G. 2. c. 28. s. 5. : the plaintiff, therefore, was not a person “ paying or satisfying ” such legacy within the first-mentioned act. It is urged that the devisee cannot have been intended to pay this duty ; but there is no reason that the testator should not have meant to charge this on the land, as well as the 500*l.* annuity. It is said that the legatee must pay the tenant of the land, and then take his remedy in equity against the executor. But the legislature cannot have contemplated this circuitous course, when it directed, by 45 G. 3. c. 28. s. 5., that the duty on legacies charged upon land should be paid by the devisee ; and, in a case like the present, if the tenant himself be not liable, his remedy must be by proceeding directly against the executor for reimbursement out of the residue.

Kelly in reply. It is not necessary to dispute the cases in equity where the question was between parties

(a) 4 *Russ.* 352.

entitled to legacies, and the executor or residuary legatee. But *Hales v. Freeman* (a), so far as it can be an authority on a point not expressly raised, shews that the rule would be different as between a legatee and a devisee of the land having paid the duty. It must be maintained, on the other side, that the legacy duty is a charge on the land itself. The act 45 G. 3. c. 28. s. 5. requires, in the case of legacies charged on land, that the duty shall, in the first instance, be paid by the trustee or devisee, and then retained by him, as is there directed. In the case of an annuity the duty is not taken as a deduction of so much from the annual sum payable, but is a gross sum, charged upon the calculated value of the annuity, to be paid by four instalments. Now, supposing the annuity to equal the full annual value of the land, if the devisee cannot retain or recover against the legatee, how is the duty to be repaid him? If he is to look to the executor, the question must arise, in every case where a legacy like this is to be paid,—whether there are sufficient assets to pay the duty? [*Littledale J.* In the case of a legacy on personalty, the course would be, not to pay the whole down, but only so much as would leave enough in the executor's hands to make up the duty on what he paid.] In this case, as in *Hales v. Freeman* (a), the legacy has been paid in full before the duty. Supposing, then, that the legacy is left free from duty; the only consequence is, that the executor must pay the amount of such duty to the legatee out of the residue; but, in the meantime, till the assets are marshalled, that amount is a debt from the legatee to the tenant, by reason of the latter having been called

1833.

 Stow
 against
 DAVENPORT.

(a) 1 B. & B. 391.

1833.

Stow
against
DAVENPORT.

upon by the crown to pay it. If it is chargeable upon the land, the sufficiency of the land is a question of equity, which cannot be raised here.

Cur. adv. vult.

The judgment of the Court was now delivered by DENMAN C. J., who, after stating the facts of the case, proceeded as follows:—The first objection to the plaintiff's right to recover was, that such an annuity, so issuing out of land, was not subject to the legacy duty. The contrary, however, was decided in the case of *The Attorney-General v. Jackson (a)*, after full argument and time taken to consider. The authority of that decision was questioned in the argument before us, but it appears to us to be correct.

It follows, from the 36 G. 3. c. 52. s. 6. and the 45 G. 3. c. 28. s. 5., that the plaintiff, who was in possession of the lands, was compellable to pay the legacy duty upon this annuity; and from the case of *Hales v. Freeman (b)*, that he might recover the amount so paid against the annuitant in this form of action, if the annuitant were chargeable with this duty.

But a second point was then made, that this annuity was devised clear of all taxes and deductions, and that the annuitant was therefore entitled to receive it without any deduction of the legacy duty.

It is a very probable conjecture, that the testator had not the legacy duty in his contemplation at all, and that he may not even have known that the annuity was by law liable to the payment of it. But we must understand the words of the will in their plain and ordinary sense, unless such a construction would be at variance

(a) 1 Cro. & Jerv. 101. 2 Tyr. 50.

(b) 2 Brod. & B. 391.

with

with the intention of the testator, to be collected from the context. The will provides that the annuity is to be paid "clear of all *taxes* and deductions whatsoever;" that is, that the net sum of 500*l.* is annually to come into the annuitant's hands; and this cannot be unless the legacy duty is deducted. No other part of the will leads us to a different construction. This decision is in conformity with those cited in argument, *Barksdale v. Gilliatt* (a), *Dawkins v. Tatham* (b), *Smith v. Anderson* (c); in none of which, however, were the legacies provided to be paid clear of *taxes*; and in that respect they are not so strong as the present case. The legacy duty is clearly a *tax*; and, unless it be deducted, the annuity will not be paid *clear of taxes*. If the testator had intended to exempt it from *the proportion of the taxes affecting the land*, as the land tax, or other future taxes of the like nature, he ought to have used some qualifying expression. As he has not done so, we must take his meaning to have been, that no tax of any description should reduce the amount to be paid to the legatee.

By whom, then, is the duty to be paid? There is no charge upon any other fund than the land. The land is devised to the use that the legatee should take *from and out of the premises* an annuity to be paid clear of all taxes and deductions. The burthen of paying the annuity clear of all taxes and deductions is thrown upon the land, that is, the land is subject both to the annuity and the tax; and it is the same as if the amount of the tax were directly charged upon the land; consequently the plaintiff took the land subject to that charge;

1833.

Stow
against
DAVENPORT.

(a) 1 Swanst. 562.

(b) 2 Sim. 492.

(c) 4 Russ. 352.

1833.

STOW
against
DAVENPORT.

and when he paid the duty, he released the land from it, leaving it still liable to the net annuity. He cannot, therefore, be considered as having paid a sum of money to which the annuitant was liable; and, therefore, cannot be permitted to recover it from her. It is no hardship on the plaintiff, for if the value of the land had not been adequate to the payment of both the tax and the annuity, he might have renounced the devise. In the case of *Hales v. Freeman* (a), the question as to the meaning of the word *deduction*, used in the will by which the annuity was granted, was never raised, and therefore it is no authority in this respect.

The judgment must be for the defendant.

(a) 1 Brod. & B. 391.

Monday,
June 10th.

SOPHIA NOWELL *against* DAVIES and Another,
Executors of RICHARD HEAVEN.

In an action against executors for a debt of the testator, a person entitled to an annuity under the will is not disqualified by interest from giving evidence for the defendants.

ASSUMPSIT for wages due from the testator in his lifetime to the plaintiff. Plea, the general issue. At the trial before *Denman* C. J., at the *Middlesex* sittings after *Michaelmas* term 1832, a witness named *Sarah Heaven* was called on behalf of the defendants, and, being examined upon the voir dire, admitted that her husband was entitled to an annuity of 26*l.* under the testator's will. It was thereupon objected that she was incompetent, having an interest in preventing the diminution of the funds; and upon this objection the Lord Chief Justice refused to admit her evidence. It was not expressly proved that the funds would or would not be sufficient to pay the annuity

nuitly if the plaintiff recovered. The jury having found for the plaintiff, a rule nisi for a new trial was obtained in the ensuing term, on the ground that the witness had been improperly rejected.

1833.

 NOWELL
 against
 DAVIES.

Sir *James Scarlett* and *R. V. Richards*, in this term, shewed cause. The witness stood in the same predicament with her husband, who was entitled to 26*l.* a year if the funds were sufficient. If they were sufficient, perhaps the objection of interest is removed; but the onus of proving that lay upon those who called the witness, as in the case of any other *primâ facie* disqualification. Here the onus probandi could not justly be thrown upon the plaintiff, the state of the funds being a matter peculiarly within the knowledge of the executors. The principle is precisely the same as where a creditor is precluded from giving evidence on behalf of assignees, to increase the fund out of which he expects to be paid. If the funds are already sufficient, it lies upon the assignee to prove that in answer: evidence is never given of the insufficiency. That a creditor is, *primâ facie* at least, not a competent witness for an executor, to increase the estate, appears from *Craig v. Cundell* (a), cited to this point in 1 *Stark. on Ev.* 137. It has, indeed, been said that a creditor may as well give this evidence for the representatives after the testator's death, as for the testator himself (which he clearly may), during his life (b). But, after the testator's death, the estate is a specific, limited fund, and the creditor has nothing further to look to. It is different while the testator is alive. And in *Clarke v. Gannon* (c), it was

(a) 1 *Campb.* 391.(b) *Paul v. Brown*, 6 *Esp.* 34.(c) *Ry. & M. N. P. C.* 31.

held,

1333.

 NOWELL
 against
 DAVIES.

held, that a *paid* legatee was a competent witness for the executors, which implies that an unpaid one would not. [*Patteson J.* The case was not put on that ground.]

The *Solicitor-General*, *contra*. The point in question was properly decided at the trial, upon the broad ground of incompetency by reason of an interest, and not upon any question as to the probable solvency or insolvency of the estate. [*Parke J.* It is difficult to see how the solvency of the estate could make any alteration as to the competency of the witness. That depended on the legal result of the suit as to him.] The proposition on the other side must be, that in every case a legatee is incompetent, however small the legacy may be, unless evidence be given that the estate is solvent. But the onus of proof ought to lie on those who seek to disqualify. The case of a creditor offering evidence for the assignees of a bankrupt is different; there the insolvency is apparent, and the creditor is one of the very parties on whose behalf the action is brought. But in other cases a man may be a witness to increase the estate of his debtor during the debtor's lifetime; upon what principle may he not be so for the debtor's executor? [*Parke J.* It may be said that the executor is only liable to the extent of the assets, and that procuring a verdict for the executor is a step to increase them; though it does not necessarily follow that the creditor would obtain judgment to recover out of those assets.] In *Paull v. Brown (a)* it was held, that in an action by an executor for a debt due to the intestate, a creditor of

(a) 6 E.p. N. P. C. 34.

the intestate is a good witness to prove it. In a case before *Parke J.* (a), the unsatisfied creditor of an intestate was held a good witness for the administratrix, on a plea of plene administravit. And if such testimony were not admissible for the executor or administrator when defendant, neither ought it to be received when he is plaintiff. Nor is there any distinction in this respect between a creditor and a legatee. The utmost that can be said is, that a verdict for the executor may facilitate the paying of the legacy. [*Parke J.* In *Baker v. Tyrwhitt* (b), a residuary legatee was held incompetent; but on the ground that if the executrix, for whom the witness appeared, had to pay her own costs, they would be allowed out of the estate, and the residue lessened by so much.]

1893.

 NOWELL
 against
 DAVIES.
Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. The rest of the Court think, and I agree in the opinion, that the witness ought to have been received. There is no distinguishing this case from *Paull v. Brown* (c). The rule must, therefore, be absolute.

Rule absolute.

(a) *Davies v. Davies*, 1 M. & M. 345.

(b) 4 Campb. 27.

(c) 6 Esp. N. P. C. 34.

1893.

—
 CLEMENTS
 against
 LANGLEY.

sequently proved for: *Ex parte Myers* (a). But here there was a debt clearly incurred at the time of the bankruptcy, and capable of being ascertained; the principle, *certum est quod certum reddi potest*, applies. In *Aflalo v. Fourdrinier* (b), *Tindal* C. J. says, with reference to the case of a person discharging a partnership debt after a commission of bankrupt issued against his partner,—“The solvent partner, if not properly a surety for his partner’s share, because each is originally liable for the whole, yet may, with strict propriety, be called, as to the share belonging to his partner, a person liable for the debt of another, and in that character would be entitled to prove under the commission:” and he cites *Ex parte Young* (c), and *Ex parte Watson* (d), where the Vice-Chancellor said, that “a solvent partner, winding up the partnership concerns, is to be considered as a surety paying the debt after the bankruptcy, in respect of his previous liability.” So, here, if the plaintiff was not strictly a surety, he was within the act as a “person liable.” In *Wood v. Dodgson* (e), also cited by *Tindal* C. J. in *Aflalo v. Fourdrinier*, *Le Blanc* J., referring to 49 G. 3. c. 121. s. 8. (which corresponded with 6 G. 4. c. 16. s. 52.), says,—“Before the act, the original debt would have been barred by the certificate, and the remedy proposed seems to have been, that when any person, at the issuing of the commission, should be surety for, or liable for the original debt of the bankrupt, the bankrupt should be relieved in the same manner from all claims of such person

(a) 1 *Mont. & Bligh*, 229.(b) 6 *Bing.* 306. 3 *M. & Payne*, 743.(c) 2 *Rose, B. C.* 40.(d) 4 *Madd. Rep.* 477.(e) 2 *M. & S.* 195.

arising out of the original debt, although the cause of action arose after the bankruptcy."

1833.

CLEMENTS,
against
LANGLEY.

DENMAN C. J. The question in this case is, whether the money which the plaintiff was called upon to pay on his liability under the bond, was money paid to the use of the bankrupt, so that the plaintiff could have proved it under his commission. I am of opinion that it was not. The effect of the fifty-second section of the bankrupt act is, that the party who is to prove must be directly surety, or liable, or bail, for the bankrupt. To graft upon this clause the liability of one co-surety for another on default made by the principal, which is attempted in the present case, would be going to a length which, in my opinion, is not warranted. There was no debt which could have been established against the defendant under the commission. The plaintiff's liability depended on two contingencies; first, whether the original debtor would pay; and, secondly, whether in his default the co-sureties would be called upon. No direct liability arose till after the bankruptcy; and then I do not see that there was such a liability of the bankrupt to his co-surety as could have been proved under the commission.

LITLEDALE J. I cannot see how the plaintiff here could be considered a surety, or liable for the debt of the bankrupt. The co-sureties were not so for each other, but for the principal; and I think the statute contemplates the case where the bankrupt is the principal debtor. It is true that in point of form, when the bond was once forfeited, an action was maintainable against all the obligors; but that did not, in my opinion,

1893.

—
 CLEMENTS
against
 LANGLEY.

constitute a debt of the bankrupt within the statute. The decision in *Wood v. Dodgson* (a), (that solvent partners, who had been compelled after a dissolution to pay the debt of a bankrupt partner, for which they were jointly liable at law, might prove for it against his estate,) went a great way, but the doctrine here contended for would go still further. Again, supposing the bond forfeited at the time of the bankruptcy, and that the parties had been sued upon it, and judgment obtained, and that the penalty stood as a security for further breaches, how could this liability be valued as a debt from the bankrupt to the co-sureties? An annuity for life or years may be valued at any time; but here, although the engagement was to pay at the end of five years, the principal and interest might be called in before. It is impossible to form an estimate of such a contingency, and therefore I think the liability was not matter of proof under the commission, as it was not a subject of valuation.

PARKE J. I am of the same opinion, though I should readily have come to a different conclusion if there had appeared proper grounds for it. The doctrine contended for on the part of the plaintiff is within the reason of the act, and would be convenient, but it is not borne out by the words. The plaintiff cannot be said to have been liable at the time of the commission for a debt of the bankrupt. The debt then subsisting was the principal's: the bankrupt was only a co-surety with the plaintiff and others. It is said the forfeiture before the bankruptcy created a debt to the obligee.

(a) 2 M. & S. 195.

But

But on this bond, framed as it was, no debt arose that was capable of being ascertained, beyond the interest due in *June* 1829, and that is, as between the obligees, the debt of *Channell*: as to the principal and future interest, there is no ascertainable debt existing. Notice might have been given at any time during the five years, to pay the principal and interest, and until such notice, or the expiration of the time, it was uncertain what the debt would be. No specific part could have been proved for against the defendant's estate. This is not within the cases where the penalty of a forfeited bond has been made use of as a means of working out the fulfilment of an obligation upon equitable principles, as *Ex parte Fisher (a)*, *Sammon v. Miller (b)*. There it could be ascertained what was the precise liability of the bankrupt: but in *Taylor v. Young (c)*, where the liability under the bond was not capable of valuation, the Court held that there could be no proof in respect of the penalty: and the present case comes nearer to that than to the former ones. It was uncertain what would be due at any particular time, and also, whether or not *Channell*, the debtor, would perform his duty by paying it. In *Ex parte Young (d)*, and *Wood v. Dodgson (e)*, the bankrupt, as between himself and his partners, was the principal debtor. No case has yet occurred in which a co-surety has been placed in the situation of a surety. In *Ex parte Hunter (g)*, though *Reynier* and the *Jacksons* were sureties to the Bank for *Joseph* and *John Corsbie*, the principal debtors, they were, as between themselves, by the giving of cross acceptances, sureties

1833.

 CLEMENTS
against
 LANGLEY.
(a) *Duck's Cases in Bankruptcy*, 188.

(c) 3 B. & A. 521.

(e) 2 M. & S. 195.

(b) 3 B. & Ad. 596.

(d) 2 Rose, B. C. 40.

(g) 2 Glyn & Ja. 7.

1893.
 ———
 CLEMENTS
against
 LANGLEY.

for each other; and Lord *Eldon* therefore held, that *Reyner*, having paid the bill by which he became, as between himself and the *Jacksons*, surety for them, was entitled to prove on their estate.

PATTESON J. I was struck with the analogy between this case and *Wood v. Dodgson* (a), which would certainly have been strong if the whole amount claimed for principal and interest had been payable when the commission issued. But here only a small amount of interest was due at that time. Then for what could these parties have proved against their co-surety? There could have been no dividend but for a proportion of that small amount of interest, which has in fact been paid since, and which forms no part of the present demand. *Browne v. Lee* (b) does not apply; that case arose upon an annuity, and came under the seventeenth section of 49 G. 3. c. 121., which enabled annuity creditors to prove. It was held there that a surety who had been obliged to pay arrears of an annuity, was not an annuity creditor of his bankrupt co-surety, within that clause: but the fifty-fifth section of 6 G. 4. c. 16. was introduced on purpose to afford a remedy in that respect. I cannot see in this case how the plaintiff could be considered a surety for the bankrupt, or how the certificate could be a discharge.

Rule discharged.

(a) 2 M. & S. 195.

(b) 6 B. & C. 689.

1833.

The KING *against* The Inhabitants of the County of DEVON. *Monday, June 10th.*

INDICTMENT for non-repair of *Tipton Bridge*, in the parish of *Ottery St. Mary*, in the county of *Devon*. Plea, not guilty. At the trial before *Park*, Sir *Allan, J.*, at the *Dorsetshire* Spring assizes, 1833, it appeared that, before the 24th of *June* 1803, when the 43 G. 3. c. 59. was passed, there had been a bridge over the river *Ottery* on the site of the bridge indicted, used by the public as a carriage bridge, and which the county repaired. The abutments on which the bridge rested, on each side of the river, were of stone, but all the other parts were of wood. In 1807, the wooden part of this bridge was, during a flood, carried some distance down the river, but the abutments remained, and such part of the old wooden work as was fit for the purpose was collected, and some new materials were added, and the whole was replaced on the old abutments. The bridge was made about two feet wider than it was before. This was done at the expense of the parish, and not of the county, and the enlarged bridge had been since used by the public. It was objected, that as the bridge so widened had not been erected or built under the direction of the county surveyor, as required by the 43 G. 3. c. 59. s. 5., the inhabitants of the county were not bound to repair it. The learned Judge directed the jury to find a ver-

Before the stat. 43 G. 3. c. 59. there had been a public county bridge, which was of wood, resting on stone abutments. After that statute passed, the wooden part of the bridge was, during a flood, carried some distance down the river, but the stone abutments remained. Part of the wooden materials being afterwards collected together, were, with new materials formed into the upper part of a bridge, which was wider than it had been before the flood, and placed upon the old abutments. This was done at the expense of the parish, and not under the direction of the county surveyor : Held, that this was not a bridge "erected or built" after the passing of

43 G. 3. c. 59. s. 5. ; and that the inhabitants of the county were bound to repair it.

1833.

CLEMENTS
against
LANGLEY.

sequently proved for: *Ex parte Myers* (a). But here there was a debt clearly incurred at the time of the bankruptcy, and capable of being ascertained; the principle, *certum est quod certum reddi potest*, applies. In *Aflalo v. Fourdrinier* (b), *Tindal* C. J. says, with reference to the case of a person discharging a partnership debt after a commission of bankrupt issued against his partner,—“The solvent partner, if not properly a surety for his partner’s share, because each is originally liable for the whole, yet may, with strict propriety, be called, as to the share belonging to his partner, a person liable for the debt of another, and in that character would be entitled to prove under the commission:” and he cites *Ex parte Young* (c), and *Ex parte Watson* (d), where the Vice-Chancellor said, that “a solvent partner, winding up the partnership concerns, is to be considered as a surety paying the debt after the bankruptcy, in respect of his previous liability.” So, here, if the plaintiff was not strictly a surety, he was within the act as a “person liable.” In *Wood v. Dodgson* (e), also cited by *Tindal* C. J. in *Aflalo v. Fourdrinier*, *Le Blanc* J., referring to 49 G. 3. c. 121. s. 8. (which corresponded with 6 G. 4. c. 16. s. 52.), says,—“Before the act, the original debt would have been barred by the certificate, and the remedy proposed seems to have been, that when any person, at the issuing of the commission, should be surety for, or liable for the original debt of the bankrupt, the bankrupt should be relieved in the same manner from all claims of such person

(a) 1 *Mont. & Bligh*, 229.(b) 6 *Bing.* 306. 3 *M. & Payne*, 743.(c) 2 *Rose, B. C.* 40.(d) 4 *Madd. Rep.* 477.(e) 2 *M. & S.* 195.

arising out of the original debt, although the cause of action arose after the bankruptcy."

1833.

—
CLEMENTS,
against
LANGLEY.

DENMAN C. J. The question in this case is, whether the money which the plaintiff was called upon to pay on his liability under the bond, was money paid to the use of the bankrupt, so that the plaintiff could have proved it under his commission. I am of opinion that it was not. The effect of the fifty-second section of the bankrupt act is, that the party who is to prove must be directly surety, or liable, or bail, for the bankrupt. To graft upon this clause the liability of one co-surety for another on default made by the principal, which is attempted in the present case, would be going to a length which, in my opinion, is not warranted. There was no debt which could have been established against the defendant under the commission. The plaintiff's liability depended on two contingencies; first, whether the original debtor would pay; and, secondly, whether in his default the co-sureties would be called upon. No direct liability arose till after the bankruptcy; and then I do not see that there was such a liability of the bankrupt to his co-surety as could have been proved under the commission.

LITLEDALE J. I cannot see how the plaintiff here could be considered a surety, or liable for the debt of the bankrupt. The co-sureties were not so for each other, but for the principal; and I think the statute contemplates the case where the bankrupt is the principal debtor. It is true that in point of form, when the bond was once forfeited, an action was maintainable against all the obligors; but that did not, in my opinion,

1833.

CLEMENTS
against
LANGLEY.

constitute a debt of the bankrupt within the statute. The decision in *Wood v. Dodgson* (a), (that solvent partners, who had been compelled after a dissolution to pay the debt of a bankrupt partner, for which they were jointly liable at law, might prove for it against his estate,) went a great way, but the doctrine here contended for would go still further. Again, supposing the bond forfeited at the time of the bankruptcy, and that the parties had been sued upon it, and judgment obtained, and that the penalty stood as a security for further breaches, how could this liability be valued as a debt from the bankrupt to the co-sureties? An annuity for life or years may be valued at any time; but here, although the engagement was to pay at the end of five years, the principal and interest might be called in before. It is impossible to form an estimate of such a contingency, and therefore I think the liability was not matter of proof under the commission, as it was not a subject of valuation.

PARKE J. I am of the same opinion, though I should readily have come to a different conclusion if there had appeared proper grounds for it. The doctrine contended for on the part of the plaintiff is within the reason of the act, and would be convenient, but it is not borne out by the words. The plaintiff cannot be said to have been liable at the time of the commission for a debt of the bankrupt. The debt then subsisting was the principal's: the bankrupt was only a co-surety with the plaintiff and others. It is said the forfeiture before the bankruptcy created a debt to the obligee.

(a) 2 M. & S. 195.

But

But on this bond, framed as it was, no debt arose that was capable of being ascertained, beyond the interest due in *June* 1829, and that is, as between the obligees, the debt of *Channell*: as to the principal and future interest, there is no ascertainable debt existing. Notice might have been given at any time during the five years, to pay the principal and interest, and until such notice, or the expiration of the time, it was uncertain what the debt would be. No specific part could have been proved for against the defendant's estate. This is not within the cases where the penalty of a forfeited bond has been made use of as a means of working out the fulfilment of an obligation upon equitable principles, as *Ex parte Fisher* (a), *Sammon v. Miller* (b). There it could be ascertained what was the precise liability of the bankrupt: but in *Taylor v. Young* (c), where the liability under the bond was not capable of valuation, the Court held that there could be no proof in respect of the penalty: and the present case comes nearer to that than to the former ones. It was uncertain what would be due at any particular time, and also, whether or not *Channell*, the debtor, would perform his duty by paying it. In *Ex parte Young* (d), and *Wood v. Dodgson* (e), the bankrupt, as between himself and his partners, was the principal debtor. No case has yet occurred in which a co-surety has been placed in the situation of a surety. In *Ex parte Hunter* (g), though *Reyner* and the *Jacksons* were sureties to the Bank for *Joseph* and *John Corsbie*, the principal debtors, they were, as between themselves, by the giving of cross acceptances, sureties

1833.

 CLEMENTS
 against
 LANGLEY.
(a) *Buck's Cases in Bankruptcy*, 188.

(b) 3 B. & Ad. 596.

(c) 3 B. & A. 521.

(d) 2 Rose, B. C. 40.

(e) 2 M. & S. 195.

(g) 2 Glyn & Ja. 7.

1893.

CLEMENTS
against
LANGLEY.

for each other; and Lord *Eldon* therefore held, that *Reyner*, having paid the bill by which he became, as between himself and the *Jacksons*, surety for them, was entitled to prove on their estate.

PATTESON J. I was struck with the analogy between this case and *Wood v. Dodgson (a)*, which would certainly have been strong if the whole amount claimed for principal and interest had been payable when the commission issued. But here only a small amount of interest was due at that time. Then for what could these parties have proved against their co-surety? There could have been no dividend but for a proportion of that small amount of interest, which has in fact been paid since, and which forms no part of the present demand. *Browne v. Lee (b)* does not apply; that case arose upon an annuity, and came under the seventeenth section of 49 G. 3. c. 121., which enabled annuity creditors to prove. It was held there that a surety who had been obliged to pay arrears of an annuity, was not an annuity creditor of his bankrupt co-surety, within that clause: but the fifty-fifth section of 6 G. 4. c. 16. was introduced on purpose to afford a remedy in that respect. I cannot see in this case how the plaintiff could be considered a surety for the bankrupt, or how the certificate could be a discharge.

Rule discharged.

(a) 2 M. & S. 195.

(b) 6 B. & C. 689.

1833.

The KING *against* The Inhabitants of the *Monday,*
County of DEVON. *June 10th.*

INDICTMENT for non-repair of *Tipton Bridge*, in the parish of *Ottery St. Mary*, in the county of *Devon*. Plea, not guilty. At the trial before *Park*, Sir *Allan, J.*, at the *Dorsetshire* Spring assizes, 1833, it appeared that, before the 24th of *June* 1803, when the 43 G. 3. c. 59. was passed, there had been a bridge over the river *Ottery* on the site of the bridge indicted, used by the public as a carriage bridge, and which the county repaired. The abutments on which the bridge rested, on each side of the river, were of stone, but all the other parts were of wood. In 1807, the wooden part of this bridge was, during a flood, carried some distance down the river, but the abutments remained, and such part of the old wooden work as was fit for the purpose was collected, and some new materials were added, and the whole was replaced on the old abutments. The bridge was made about two feet wider than it was before. This was done at the expense of the parish, and not of the county, and the enlarged bridge had been since used by the public. It was objected, that as the bridge so widened had not been erected or built under the direction of the county surveyor, as required by the 43 G. 3. c. 59. s. 5., the inhabitants of the county were not bound to repair it. The learned Judge directed the jury to find a ver-

Before the stat. 43 G. 3. c. 59. there had been a public county bridge, which was of wood, resting on stone abutments. After that statute passed, the wooden part of the bridge was, during a flood, carried some distance down the river, but the stone abutments remained. Part of the wooden materials being afterwards collected together, were, with new materials formed into the upper part of a bridge, which was wider than it had been before the flood, and placed upon the old abutments. This was done at the expense of the parish, and not under the direction of the county surveyor: Held, that this was not a bridge "erected or built" after the passing of 43 G. 3. c. 59. s. 5.; and that the inhabitants of the county were bound to repair it.

1833.

—
 The KING
 against
 The Inhabit-
 ants of
 the County of
 Devon.

dict of guilty, but reserved liberty to the defendants to move to enter a verdict of acquittal, if this Court should be of opinion that the objection was well founded. A rule nisi for that purpose having been obtained in last *Easter* term,

The Solicitor-General and *Elliott* now shewed cause. The bridge having been adopted by the public, the inhabitants of the county are *primâ facie* bound to repair it. It is said they are not, because the bridge was erected or built after the passing of the act 43 G. 3. c. 59. s. 5., which enacts "that no bridge thereafter to be erected or built shall be deemed to be a bridge which the inhabitants of any county shall be compellable to repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction, or to the satisfaction, of the county surveyor;" and that here the bridge was not built under the direction of the surveyor of the county of *Devon*, and the inhabitants of that county are therefore not liable to repair. That reduces the question to this, whether the bridge is not in substance the same as the one which existed before 1807. The materials of which it is composed being to a certain extent different, does not of necessity destroy the identity of the bridge. All the materials of which such a structure is composed may, by frequent repairs and alterations from time to time, be entirely changed; but it will not, therefore, cease to be the same bridge. The principal object of the enactment was to prevent the increase of the number of bridges which counties are liable to repair. By holding that the county is liable in this case, the number of bridges repairable by the county will not be increased.

The

The bridge was erected on the same site as the one which existed in 1803, before the statute 43 G. 3. c. 59. passed, and it consisted principally even of the same materials. *Rex v. The Inhabitants of Lancashire* (a) shews that this section of the act does not apply to a bridge widened or repaired; and in that case new materials must be added. *Taunton J.* said there, "that the enlargement of the bridge did not destroy its identity; it was the same bridge, though wider." That observation applies to the present case.

1833.

The King
against
The Inhabit-
ants of
the County of
Devon.

Crowder and *Praed* contra. This bridge was erected and built after the passing of the 43 G. 3. c. 59. s. 5., the object of which statute, as appears by the preamble, was to point out precisely the bridges which inhabitants of counties should be liable to repair. The enacting part applies to all bridges there described, which shall thereafter be erected or built. After the flood in 1807, *Tipton Bridge* had ceased to exist. The abutments which then remained did not constitute a bridge. The bridge indicted was then *erected or built*, and is, therefore, within the very words of the statute. The 22 H. 8. c. 5. s. 4. enables justices to tax inhabitants of counties for such reasonable sums as they may think sufficient for the repairing, *re-edifying*, and *amendment* of bridges. The word *re-edify* is not in the statute 43 G. 3. c. 59. s. 5. The object of that enactment was twofold: first, to relieve counties from the burden of repairing an increased number of bridges, which, before the act, might have been cast on them by any irresponsible persons who chose to build a bridge which was

(a) 2 B. & Ad. 813.

after-

1833.

The King
against
The Inhabitants of
the County of
Devon.

afterwards used by the public; secondly, to prevent the building of insecure and insufficient bridges. Now if, after a bridge has been once built, any person may substitute in lieu of it another, not constructed under the superintendence of the county surveyor, one of the mischiefs contemplated by the legislature may occur. The enactment was intended to apply to bridges rebuilt as well as built. [*Parke J.* What exempted the inhabitants from repairing the old bridge?] It no longer existed. [*Denman C. J.* Before the wooden part of the bridge was replaced on the old abutments, the inhabitants of the county were liable to repair; if that part was carried away in consequence of their neglect to repair, does that exempt them for the future?] Undoubtedly they might have been indicted, if guilty of neglect, but the parish took on themselves to build a new bridge. [*Lit- tledale J.* Suppose judgment were given for the defendants on the ground that this is a new bridge erected since the statute; the inhabitants of the county were liable to be indicted for not repairing the bridge at the time when the wooden part was washed away; and if it was their duty then to repair the old bridge, and the parish has built a new one under a misconception, the inhabitants of the county are still liable to repair the old bridge. If this be not a county bridge, it might be the duty of the county to prostrate it as a nuisance.]

DENMAN C. J. I am of opinion that this is substantially the same bridge as that which existed before 1807. The stone abutments of the old bridge have always remained. It is a public bridge, which the inhabitants of the county are, *primâ facie*, bound to repair. They say they are not so bound, because it was erected

or

or built since 1803, not under the directions or to the satisfaction of the county surveyor, as required by the 43 G. 3. c. 59. s. 5. I think, however, that this is not a bridge which was built or erected in 1807, within the meaning of those words in that statute, but one which was then repaired and re-edified within the meaning of 22 H. 8. c. 5. s. 4. (a) It consists, for a great part, of the same materials which existed before 1807. But the question, whether it be the same or not, depends not so much on the identity of the materials of which the bridge is from time to time composed, as of the identity of the public right of passage over a bridge at that place.

1833.

The King
against
The Inhabit-
ants of
the County of
Devon.

LITTLEDALE J. In 1801, there was a bridge on the same site as the one indicted, and the inhabitants of the county were bound to repair it. The upper part of this bridge was of wood, and rested at each end on stone abutments. The wooden part was washed away in 1807, but the abutments remained. The inhabitants of the county were at that time bound to repair the bridge, which was then ruinous. If it had been repaired by the county in the manner it was subsequently by the parish, it would have been substantially the same bridge which existed before; and, although it was, in fact, repaired, not by the inhabitants of the county, but by other persons, I think it did continue the same bridge. If, indeed, the abutments, as well as the other parts of the bridge had been destroyed, and an entire new bridge had been built on the same site, I should have doubted, whether such a bridge would

(a) See, as to the words "rebuild and repair," and "re-edify," *Doe v. Dymoke v. Withers*, 2 B. & Ad. 896.

1833.

*The King
against
The Inhabit-
ants of
the County of
Devon.*

be within the act or not. The fifth section of the act seems to have had two objects in view: one, that the number of bridges which the county were bound to repair should not be unnecessarily increased; and the other, that individuals or parishes should not take on themselves to build bridges, so as to cast the burden of repair on the county, unless they were properly built, under the directions of the county surveyor. Now, a new bridge built on the site and in lieu of an old one, seems to be within the intention of the legislature, and it is certainly within the words of the statute. It is unnecessary, however, to give a decided opinion on that point, because the bridge here is substantially the same as that which existed before the statute: it not only stands on the same site, but consists in great part of the same materials.

PABKE J. I am of opinion, that the bridge indicted was not built or erected since the passing of the 43 G. 3. c. 59. The evidence is, that there was not in this case an erecting or building of a new bridge, but a repairing of the old one.

PATTESON J. This is, in substance, the same bridge as the one which existed before the statute.

Rule discharged.

1833.

SIMS and Another *against* BOND and Another.

ASSUMPSIT for money had and received, money paid, &c. Plea, general issue. At the trial before *Denman C. J.*, at the *London* sittings after *Michaelmas* term, 1832, it appeared that the action was brought by the plaintiffs, who were surviving part owners of a vessel called the *Princess Charlotte*, to recover from the defendants, bankers in *London*, 1750*l.*, the balance of a banking account, kept in the name of *Charles Gribble*, a part owner, and ship's husband, and 3478*l.* 3*s.* 8*d.*, appearing due from them in an account with *John Gribble*, his executor. It was proved that *Charles Gribble*, as ship's husband, was permitted by the owners to have the possession of two warrants for the freight of the vessel, payable by the *East India* Company, which warrants had been given by the company on a receipt being signed by *Charles Gribble* and another of the owners, and which were directed to the cashiers of the Bank of *England*, ordering them to pay to the owners of the *Princess Charlotte*, or bearer, on account of freight. These two warrants *Charles Gribble* put into the hands of the defendants, in order that they might receive the money, and place it to his credit in an account opened in his name in the defendants' books. This was done; and on *Charles Gribble's* death, the

Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, and was received as such :

And, therefore, where *A.* as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the *East India* Company, to pay to the said owners or bearer the sum of money therein mentioned, for freight; and *A.* deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit

for it in account: it was held, on assumpsit brought after *A.'s* death by the surviving part owners against the bankers, that on proof of the above facts, they could not recover the money, because it was not shewn that the loan was upon their account; for the fact of the warrants being the property of all the part owners, when placed in the bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was *A.'s* loan.

first

1893.

 Sims
 against
 Bond.

first mentioned balance appeared due to him upon the account. Afterwards, *John Gribble* opened a new account, as executor of *Charles*, to the credit of which 3478*l.*, which had been lent by *Charles Gribble* to his son, out of the money due to him on the account kept in his name, was paid by the son after his father's death. Upon the trial, the learned Judge nonsuited the plaintiffs, on the ground that there was no privity of contract between them and the defendants. A rule nisi for a new trial having been obtained in last *Hilary* term,

The *Solicitor-General*, *F. Pollock*, and *Hoggins*, in the course of this term, shewed cause. There was no privity of contract between the plaintiffs and defendants. *Charles Gribble* was intrusted with the possession of warrants by the other part owners, and he deposited them in his own name with the defendants, and they thereby became liable to him, and he to the other owners. There was no privity of contract between all the other owners and the defendants. As to the sum of 1750*l.*, *Sims v. Brittain* (a) is decisive. The decision in that case proceeded on the ground that the contract was with *Gribble* alone. In *Stephens v. Badcock* (b), the defendant, an attorney's clerk, authorised by the attorney, received money, which his master was in the habit of receiving for the plaintiff, and gave a receipt for his master; and it was held there was no privity of contract between the plaintiff and the clerk, who took the money as the agent of the attorney, and was accountable to him only. [*Patteson J.* The question is, whether the defendants, in receiving this money,

(a) 4 B. & Ad. 375.

(b) 3 B. & Ad 354.

contracted with *Gribble* alone, or with *Gribble* and the other part owners. *Parke J.* Is it not in substance the same as if the plaintiffs themselves had received the money and handed it over to *Gribble*, and he had then placed it in the defendants' hands on his own account?] *Gribble* alone could sue the defendants, though he might be accountable to the other part owners. The defendants never consented, in fact, to receive or hold the money on account of the other part owners, and the law will not imply such a consent: *Wedlake v. Hurley (a)*. It is incumbent on the plaintiffs to make out that the defendants contracted with them, or consented to hold the money on their account: *Williams v. Everett (b)*, *Yates v. Bell (c)*. As to the other sum, which was paid in after *Gribble's* death, there can be no doubt that the executor, on whose account it was paid in, is the only person who can claim it from the defendants.

1838.

Sums
against
Bond.

Sir *James Scarlett, R. V. Richards, Follett, and F. Robinson*, contra. *Gribble* was the managing owner of the vessel, and was intrusted with the warrants; he, acting for himself and the other owners, deposited them in the hands of the defendants. The plaintiffs might have maintained trover for those warrants; and, if so, their rights cannot be substantially altered by the warrants having been changed into money. That money belonged to all the part owners; they might all join with *Gribble* (if he were alive) in bringing an action. If a factor sell goods in his own name, the principal may sue the vendee upon the contract, or the vendee

(a) 1 *Crompt. & Jer.* 83.(b) 14 *East*, 582.(c) 3 *B. & A.* 643.

may

1833.

 Sine
 against
 Bona.

may sue the principal seller for the goods. [*Parke J.* There the contract is, in point of law, the contract of the principal; the question here is, whether the plaintiffs were, from the beginning, the contracting parties.] Suppose *C. Gribble*, instead of placing the warrants in the defendants' hands, had kept the money in a private chest, separate from his own, the money would have been ear-marked, and his executors could not retain it. Per Lord *Mansfield*, in *Howard v. Jemmet (a)*. The surviving part owners might have maintained trover, or money had and received: *Taylor v. Plumer (b)*. So they may, if, instead of keeping the money in his chest, he has sent it to his bankers. It is sufficient for them to shew that it is their money. [*Parke J.* They must shew a contract by the defendants to hold the money on their account.] The defendants must have known, from the contents of the warrants, that all the part owners were interested in them. The law will then imply a contract by the defendants to hold the money for the benefit of all the part owners: *Skinner v. Stocks (c)*, *Garrett v. Handley (d)*. The loan to the son was of money which the father had no right to place to any but the partnership account. [*Parke J.* Could you have sued the son?]

Cur. adv. vult.

The judgment of the Court was delivered in the same term by DENMAN C. J., who, after stating the facts, proceeded as follows: —

We all think that the nonsuit was right. Sums which are paid to the credit of a customer with a banker,

(a) 3 Burr. 1369.

(b) 3 M. & S. 562.

(c) 4 B. & A. 437.

(d) 3 B. & C. 462. 4 B. & C. 664.

though

though usually called deposits, are, in truth, loans by the customer to the banker, *Carr v. Carr* (a), *Devaynes v. Noble* (b); and the plaintiffs, who seek to recover the balance of such an account, must prove that the loans were made *by them*.

It is a well established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.

This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases; and we do not say that where a person lends money nominally on his own account, but really on account of, and as the loan of another, the real lender may not sue for the money.

But where money is lent by another in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He must shew that the loan, though nominally that of another, was really intended to be his own.

It was incumbent, therefore, in this case, upon the plaintiffs to prove that, when *Charles Gribble* lent the proceeds of the freight warrants to the defendants, and had them placed to his credit in an account kept *in his own name*, he was acting in that respect as the agent of the plaintiffs, as well as on his own account, and really lending the money to the defendants on the plaintiffs' account as well as his own.

(a) 1 *Meriv.* 541. note.

(b) *Ibid.* 568.

1833.

Sims
against
Bond.

In this the plaintiffs certainly failed ; they only shewed that the warrants were, at the time they were placed in the hands of *Charles Gribble*, their property : which is quite consistent with the supposition that the loan of the proceeds to the defendants was *Charles Gribble's* loan. Indeed, it would be very difficult for the plaintiffs to prove that they were the real lenders ; for if they had intended to be so, it is natural to suppose that they would have taken care to raise the account in the defendant's books in their own names, or in the name of the " owners of the ship *Princess Charlotte*."

With respect to the larger sum of 3478*l.*, it is quite clear that this was paid to the bankers as the money of *John Gribble*, the executor, being a repayment to him of a loan to the like amount by the testator, *Charles Gribble*, to his son. It therefore was a loan *by the executor* ; and the executor only can sue the defendants for this account in a court of law.

We therefore think that the rule which has been obtained to set aside the nonsuit should be discharged.

Rule discharged.

1833.

TAPLEY *against* WAINWRIGHT.

DECLARATION in trespass for breaking and entering two closes, to wit, a certain close of the plaintiff called *The Croft*, and a certain other close of the plaintiff, respectively situate in the parish of *Bunbury*, in the county of *Chester*, and trampling down the grass and corn, and breaking gates. Plea, that the said closes in which, &c. were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times when, &c. to use his right of common thereon; and, because the closes in which, &c. were wrongfully separated and divided from the residue of the waste, he broke down the gates. Replication, after protesting that the closes in the declaration mentioned, in which, &c., were not parcel of the waste, and that the defendant had not such right of common, averred that the closes in which, &c., at the said times, were not wrongfully separated and divided from the residue of the waste, but continually, for twenty years and more, and before the first time when, &c., had been and were separated and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty and adversely, without the exercise of the right of common, and without any entry for or relating to the said sup-

Trespass for breaking and entering two closes of the plaintiff.

Plea, that the said closes in which, &c. were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times, when, &c. to use his right of common thereon; and, because the closes in which, &c. were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that the said closes in which, &c. at the said times, were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first

time, when, &c., had been and were separated, and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty. Rejoinder traversed this averment, and issue was joined thereon:

Held, that the allegation in the replication, that "the said closes in which, &c., for twenty years and more, had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof, that *any part* of the closes in which the trespasses were committed had been so inclosed for that period.

1833.

 TAPLEY
 against
 WAINWRIGHT.

posed right of common, and that at each of the said times they were so separated. Rejoinder traversed this averment, and issue was joined thereon. At the trial before *Bosanquet J.*, at the *Chester Spring* assizes, 1832, it appeared that the trespasses complained of were committed over the whole surface of a close, by destroying the crops growing thereon, nine tenths of which close had been inclosed from the common, and held adversely against the commoners for more than twenty years, but the residue had been inclosed for a less period. It was contended, for the defendant, that, to support the statement in the declaration, that the closes in which, &c. had been separated and inclosed from the waste for twenty years and more, it was incumbent on the plaintiff to prove that every part of those closes on which the trespasses had been committed had been so long inclosed; and for that the dictum in *Hawke v. Bacon* (a), was cited. The learned Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Lloyd, in *Easter* term, shewed cause (b). It is a well-established rule, that the plaintiff may apply the trespasses proved to any close mentioned by name in the declaration: *Cocker v. Crompton* (c). The dictum in *Hawke v. Bacon* (a), that, on an issue joined upon a replication similar to this, the plaintiff will fail if it appear that any part of the common has been inclosed within twenty years, is of very questionable authority, and must be taken to apply to those cases only where the trespasses

(a) 2 Taunt. 159.

(b) Before *Denman C. J.*, *Littledale*, and *Parke Js.*

(c) 1 B. & C. 489.

proved

proved are confined to that part. Now, *Richards v. Peake* (a), and *Bassett v. Mitchell* (b), shew that the words of the issue, "the said close in which, &c.," mean only the particular place in which the trespasses complained of were committed. It would, therefore, have been sufficient for the plaintiff to prove that the parts actually trespassed upon were inclosed for twenty years; and the question raised in the present case is, whether he be bound to prove that *all* the parts trespassed upon had been so inclosed for that period: which depends upon this, whether the words of the issue, "the close in which, &c.," constitute an entire, or a divisible allegation. If it be an entire allegation, and apply to the *whole* of the close in which the trespasses were committed, the proof is not sufficient. If it be a divisible allegation, and apply to any part of the close in which the trespasses were committed, then it is sufficient. In *Richards v. Peake* (c), *Holroyd J.* intimated an opinion that the allegation was divisible; and in *Bassett v. Mitchell* (b) *Littledale J.* said, that the allegation, "the close in which, &c.," was applicable to any part of the lands, within the bounds stated in the declaration, in which the plaintiff might shew a trespass was committed; and *Taunton* and *Patteson Js.* delivered opinions to the same effect.

1833.

 TAPLEY
 against
 WAINWRIGHT.

John Williams and *J. Jervis* contra. The rule laid down by the Court of Common Pleas in *Hawke v. Bacon* (d), is recognised by the learned editors of *Saunders's Reports*, 5th edition, in a note to *Greene v. Jones* (e). The issue tendered by the plaintiff is, that

(a) 2 B. & C. 918.

(b) 2 B. & Ad. 99.

(c) 2 B. & C. 918.

(d) 2 Taunt. 159.

(e) 1 Saund. 292. t.

1833.

—
 TAPLEY
 against
 WAINWRIGHT.

the closes in which, &c. had been separated from the rest of the waste, and enjoyed in severalty for twenty years. The proof was, that part only of those closes had been separated and held in severalty for that period. The plaintiff was bound to prove, that the whole of the closes had been enclosed and enjoyed in severalty for twenty years. He, therefore, has not proved the issue. To meet the proof given, he ought, as in *Richards v. Peake* (a), to have entered a nolle prosequi as to that part of the closes which had been uninclosed within twenty years, and confined the issue to the other parts.

Cur. adv. vult.

DENMAN C. J. in this term delivered the judgment of the Court. After stating the pleadings and facts, his Lordship proceeded as follows:—The pleadings may be considered as if there was one close only mentioned. The plea admits the trespasses in that close; but justifies them, on the ground that the close was still part of the common in point of law. The replication admits that it was so, but insists that the commoners' right of entry was taken away by an adverse possession of twenty years, according to the doctrine laid down in the case of *Creach v. Wilmot* (b); and the question on these pleadings is, whether, in order to maintain this issue, the plaintiff must prove that every part of the close had been separated and divided for that time. We are of opinion that he need not.

The words, "the said close in which, &c." have been settled, by the cases of *Richards v. Peake* (a) and *Bassett v. Mitchell* (c), to mean only the particular place, in

(a) 2 B. & C. 918. (b) 2 Taunt. 160. n. (c) 2 B. & Ad. 99.

which

which the trespasses complained of were committed. Therefore, it is clear that, upon the issue in this case, the plaintiff need not have proved that *more* than the parts actually trespassed upon, which the defendant must be understood to have known when he pleaded to them, were inclosed for twenty years.

Whether he is bound to prove that *all* the parts trespassed upon were inclosed for that period, depends upon the question, whether this be a divisible allegation.

Now it is clear that, on the general issue, the plaintiff, though he may have meant to insist on trespasses over the whole of a piece of ground, described by name or abutments, and though he gave evidence of trespasses upon the *whole*, will be entitled to recover pro tanto, though the jury should find that some only were proved. In the declaration, therefore, the term close is a divisible allegation. It seems highly reasonable, that the same rule should prevail in the replication. The plaintiff, when he avers in it, that the close in which, &c. was inclosed for twenty years, means the same thing as if he had averred, that the trespasses complained of in the declaration were committed in places, each of which had been inclosed for twenty years; and if he succeeds in proving that some of the trespasses were so committed, and some not, why should he not recover for those which were?

The case is analogous to an action for goods sold and delivered, to which there is a plea of infancy, and a replication that the goods were necessaries. If the plaintiff, on the trial, should prove that part only were necessaries, there would be no question as to his right to recover for that part. As, upon the allegation in the declaration, the plaintiff need not prove a sale of all the

1833.

TAPLEY
against
WALNBRIDGE.

1833.

—
 TAPLEY
 against
 WAINWRIGHT.

goods he alleges to have been sold, so, in the replication, he need not prove all to have been necessaries.

It appears, therefore, to us, that in this case the plaintiff ought to recover pro tanto. No doubt the parties will agree to apportion the damage found for trespasses upon the whole space, and to reduce the amount, so as to be a fair compensation for the trespasses to the part inclosed for twenty years. This will avoid the necessity of a new trial. If the defendant requires it, the verdict will be entered for the plaintiff as to part, and the defendant as to the other part of the close in which, &c.; and then if our judgment be wrong, the objection will be on the record.

Our decision is at variance with the dictum of the Court of Common Pleas in *Hawke v. Bacon* (a), which, after much consideration, we think is not founded on sufficient reason, and not supported by the analogy to the plea of *liberum tenementum*, on which it appears to have been founded.

(a) 2 Taunt. 159.

Tuesday,
 June 11th.

CLUTTERBUCK, Gent., One, &c., Assignee of
 GINGELL, a Bankrupt, against COMBES.

The Court of
 King's Bench
 does not ex-
 ercise any
 common law
 jurisdiction in
 taxing at-
 torneys' bills.

The Court, in the exercise of its statutory jurisdiction, refused to order an attorney's bill to be taxed at the instance of a third person, where the client had before admitted the amount to be due, and declined taxing the bill; such client having since become bankrupt, and the application being made for the purpose of reducing his claim so as to prevent his being a good petitioning creditor.

THE plaintiff having been employed by *Gingell* to conduct a cause for him, delivered his bill of costs, and proposed that *Gingell* should have it taxed, which he declined to do, saying there was nothing to object to. The plaintiff then had it taxed, and it amounted to 98l.

Gingell

Gingell afterwards petitioned the Insolvent Court, and filed a schedule, containing an admission of this debt. Before he obtained his discharge, the plaintiff and another creditor (their demands together exceeding 150*l.*) struck a docket against him: a commission issued, under which the plaintiff was appointed sole assignee; and in that character he commenced the present action, to recover a debt due to the bankrupt. The defendant's attorney applied to a judge at chambers for an order to tax the plaintiff's bill of costs; the object being to reduce his claim upon the bankrupt so far, that the demands of the two petitioning creditors should, together, be insufficient to sustain the commission. The order having been made, a rule was obtained in *Easter* term for setting it aside. There was an affidavit, among others, by the bankrupt, in support of the application, complaining of items in the account, and assigning reasons to explain his not having had it taxed before.

1833.

CLUTTERBUCK
against
COMBES.

R. V. Richards now shewed cause. This Court may order the taxation, by the general jurisdiction which it has, independently of the statute 2 G. 2. c. 23. s. 23. [*Littledale J.* That has been denied over and over in this Court. *Parke J.* The only doubt, when this case was first moved, was, whether the plaintiff had not acquiesced in the taxation.] It was held, in an *Anonymous* case, 2 *Chitty's Reports*, 155., that this Court had the power now contended for. [*Littledale J.* There are cases to that effect, but the contrary is now settled.] In *Dagley v. Kentish (a)*, where the point was referred

(a) 2 B. & Ad. 411.

1833.

CLUTTERBUCK
against
COMBES.

to all the Judges, they did not express any decided opinion against the exercise of the power, and this Court merely declined to interfere in the case then before them. *Wilson v. Gutteridge* (a) is in favour of the general authority of the Court. (He then proceeded to shew, from statements which it is unnecessary to go into, that the plaintiff had, by his acquiescence down a certain time, induced the defendant to proceed with the taxation.)

Godson contra. Such an order as this cannot be made, at the instance of a third party, to cut down a petitioning creditor's debt.

DENMAN C. J. The rule must be absolute. It cannot be right that a third party should tax a bill which the principal has acquiesced in. But, as the plaintiff has led the defendant to suppose that he assented to the taxation of the bill, he must pay all the costs of that proceeding.

LITTLEDALE and PARKE Js. (b) concurred.

Rule absolute.

(a) 3 B. & C. 157.

(b) Taunton J. was at Guildhall: Patteson J. in the Bail Court.

1833.

In the Matter of Arbitration between LEEMING and FEARNLEY. Tuesday,
June 11th.

A RULE nisi was obtained in a former term for setting aside the award made between these parties. The award stated an agreement, reciting that differences had arisen between the parties touching the amount of rent agreed to be given by *Leeming* as tenant to *Fearnley* from year to year, of a certain dwelling-house; that an action of replevin was then pending between them in the King's Bench touching a distress made by *Fearnley* and his bailiff on the goods of *Leeming*, in the said dwelling-house, for rent said to have been due on the 23d of *November* preceding; and that the parties had agreed to refer the suit and the matter thereof, and all disputes and differences whatsoever between them touching the said distress, and also the costs of the reference, to the award, &c. of two arbitrators, with power to appoint an umpire; and that the costs of the suit should abide the event of the award. The award then went on to state the nomination of an umpire, who awarded, in substance, as follows: — That the said action shall henceforth cease and be no further prosecuted; that the rent agreed to be given, as above mentioned, was 14*l.*; that the sum of 6*l.* was due for such rent at the time of the distress; that the said sum be paid on, &c. by *Leeming* to *Fearnley*; that *Fearnley* pay the costs of the award; and that, on the respective payments being made, the parties mutually execute general releases of all matters in difference up to the date of the agreement.

A replevin suit, and all matters in difference touching the distress, were referred to arbitration; the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed:

Held, that the award did not shew who ought to pay the costs, which were to abide the event of the suit; and, consequently, that it was not final.

Among

1833.

—
In the Matter
of *LEEMING*
and *FRANKLEY*.

Among other grounds for setting aside the award, it was alleged, that the umpire had not made an award for either party in the replevin suit, according to the submission, and that he ought to have awarded in that suit in favour of the plaintiff.

F. Pollock and *Milner* now shewed cause. The umpire has ordered a *stet processus*, which has been held a sufficient determination of a suit (a). All that can be objected on the other side is, that the award leaves the rights of the parties uncertain as to costs. But the costs are to follow the event: a sum is awarded as due to the defendant in the suit; and that is sufficiently decisive. [*Parke J.* It does not shew that an action of replevin was not maintainable. As to that, nothing is awarded but a *stet processus*. It is consistent with the award that the defendant may have avowed for a different rent from that actually reserved.] The umpire had no power to order any verdict to be entered. [*Parke J.* The costs are to follow the event of the action. *Littledale J.* The suit is put an end to; but the event is in favour of neither party.] Where a cause is referred to unlearned arbitrators, the Court will go as far as possible to make their determination available. And, in every case, to invalidate an award, some illegality must appear on the face of it: *Cramp v. Symons* (b). This is, in substance, an award that the umpire thought the defendant entitled to a verdict; and that was all he had authority to say. It is sufficient if, looking at the whole award, it appears that the matter is determined; *Jackson v. Yabsley* (c).

(a) *Blanchard v. Lily*, 9 *East*, 497.

(b) 1 *Bing.* 104.

(c) 5 *B. & A.* 848.

Starkie, contra, was stopped by the Court.

1833.

Per Curiam (a). It must appear by the award that the action is finally determined in favour of one of the parties, or else it cannot be ascertained how the costs are to go. The rule may be discharged on the defendant consenting that the award shall be amended by directing a verdict to be entered for the plaintiff in the replevin suit.

In the Matter
of *LEEMING*
and *FRANKLEY*.

Rule discharged; costs of the replevin suit to be paid to the plaintiff; and the award, by consent, to be amended if required.

(a) *Denman C. J., Littledale and Parke Js.*

The KING on the Prosecution of *BRINDLEY*
against *DEWHURST*.

Tuesday,
June 11th.

INDICTMENT for a libel charging *Brindley*, the governor of the parish workhouse at *Meller*, in the county of *Lancaster*, with having cruelly treated a female pauper. The indictment was removed by the defendant into this Court, and he having been convicted at the *Lancaster* spring assizes, 1833, a rule had been obtained for referring it to the coroner to tax the costs to be paid by the defendant to the prosecutor. A rule nisi had been obtained for discharging that rule, upon affidavits which stated that the prosecution was commenced by the direction, and carried on at the expense, of the select vestry of the parish of *Meller*; and that *Brindley* had stated he had nothing to do with the proceedings,

An indictment for a libel on the governor of a parish workhouse was preferred by the direction of the select vestry of the parish; and the defendant having removed it by certiorari into K. B., was convicted: Held, that the libelled party was not the "party grieved," within the statute 5 & 6 W. 4. c. 81. s. 8.; and therefore was entitled to costs.

1833.

—
The King
against
Dewhurst.

ceedings, and did not give any instructions for them, and was surprised when he heard they were commenced.

F. Pollock now shewed cause. The statute 5 & 6 W. & M. c. 11. s. 3. authorises the Court of King's Bench, where the defendant prosecuting the writ of certiorari is convicted of the offence, to give reasonable costs to the prosecutor, if he be the party grieved. *Brindley* is the party grieved within the meaning of the statute. It is no answer, that the members of the select vestry might, in the first instance, be liable to pay the costs of the prosecution, for *Brindley* must have paid them ultimately, either wholly or in part, as a rate payer.

Alexander contra. *Brindley* is neither prosecutor nor party grieved, and he must be both, to be entitled to costs under the statute. The object of the statute was to prevent persons who commenced prosecutions at the quarter sessions or other inferior courts, from being put to heavier expenses in the superior courts. The prosecutors, therefore, grieved by the removal of an indictment into this Court, must be those who employed the attorney, and thereby subjected themselves to the expenses of the prosecution. Here the attorney was employed, not by *Brindley*, the nominal prosecutor, but by the select vestry; the persons composing that vestry, therefore, were the prosecutors grieved by the removal of the indictment. In *Rex v. Cooke* (a) the prosecution had been conducted at the joint expense of various inhabitants of the parish in which the offence

(a) 1 Man. & Ry. 526.

had been committed; and the Court were of opinion that, as the expenses were defrayed by other persons, and not by the apparent prosecutors, these latter could not be regarded as the prosecutors within the meaning of the act. *Rex v. Edwards*, *Hilary* term 1830 (*a*), is also an authority to shew that the nominal prosecutor is not in this case the party grieved. There, the indictment was for an assault on a watchman, or constable, within the borough of *Derby*: the prosecution had been carried on by certain paving and light-

1833.

—
The KING
against
DEWMUAST.

(a) REX v. EDWARDS.

The reporters have been favoured by Mr. *Dealtry* with the following note of the above case.

The defendant was convicted and sentenced on an indictment for an assault on a watchman and night patrol, within the borough of *Derby*, who was also a constable of the said borough. The indictment was removed by the defendant from the sessions; and he consequently was liable to costs by the 5 & 6 W. & M. c. 11. s. 3. if the prosecutor was a party grieved within the meaning of that statute. The prosecutor took out a side bar rule to tax the costs under the statute. In *Hilary* term 1830, the defendant obtained a rule to shew cause why that side bar rule should not be set aside, on the ground that the prosecutor was not a party grieved within the meaning of the act; the prosecution having been carried on by the Paving and Lighting Commissioners, acting under a local act of parliament for the borough of *Derby*; that, although nominally the prosecution was carried on at the instance of the party assaulted, it was, in reality, at the sole expense and by the direction of the above commissioners, and they were not public officers within the meaning of the above statute, prosecuting as such. On cause being shewn, it was contended that the prosecution was carried on by the commissioners, whose duty it was to preserve the public peace within the borough of *Derby*, for a matter connected with their duty as commissioners; and therefore they might be considered as public officers prosecuting for a fact which concerned them as such, within the meaning of the statute.

But the Court were of opinion that the nominal prosecutor, the party assaulted, was not a party grieved within the meaning of the statute; nor were the commissioners public officers prosecuting, as such, within the meaning of the statute, and therefore they discharged the rule.

ing

1833. ing commissioners, acting under a local act for that
—
The King borough, and the Court were of opinion that the no-
against minal prosecutor was not a party grieved within the
Downum. meaning of the statute, nor were the commissioners
public officers prosecuting as such.

DENMAN C. J. *Rex v. Edwards* decides this case.

LITTLEDALE and PARKE Js. concurred.

Rule absolute.

1833.

DOE dem. WILLIAM HENRY LEACH and JAMES
 WHALLEY WICKHAM, *against* FREDERICK
 WHITAKER. *Wednesday,*
June 12th.

EJECTMENT for two messuages, two dwelling-
 houses, and four stables, four hay-lofts, four coach-
 houses, four out-buildings, and forty acres of land,

At a court baron, held in 1812, before the steward of a manor, two copyhold tenements were granted to *W. R.*, and *J. F.*, habendum for their lives and the life of the longest liver of them successively, at the will of the lord, according to the custom of the manor, at the yearly rents of 26s. 4d. and 7s., all services therefore due, and a heriot when it should happen; and the said *W. R.* was admitted tenant; but the admission and fealty of *J. F.* were respited until, &c.

In 1823, the lessees of the manor, by deed, appointed *C. L.* steward of the manor, with full power to hold courts baron and customary courts, and to do all acts usual to be done by stewards in relation thereunto; and they more especially authorised him to make any voluntary grants of customary or copyhold lands within or parcel of the manor, and to give licenses to demise, or otherwise, as he, the said *C. L.*, should think fit, and either in or out of court, as fully as the lessees might or could do.

At a court baron held out of the manor, in 1825, *J. F.* (who survived *W. R.*) surrendered to the lords lessees the above-mentioned copyhold messuages, and the lessees, by *C. L.* their steward, granted them again to *W. H. L.* and *J. W. W.*, habendum for their lives, and the life of the longest liver of them successively, according to the custom of the manor, at the yearly rents of 26s. 4d. and 7s., and all services therefore due, and a heriot for each of the said tenements when it should happen, according to the custom of the manor; and *J. H. L.* and *J. W. W.* were admitted tenants.

Held, that it was no objection to this grant that *J. F.*, the surviving life under the grant of 1812, was never admitted tenant: Nor that two rents were reserved, without distinguishing how much was payable for each tenement, the same rents having been reserved by a former grant in 1771: Nor that a heriot was reserved for each tenement when it should happen, according to the custom of the manor; for if a heriot was not demandable for each tenement, the claim could not be enforced; but that would not avoid the grant.

Held, secondly, that a customary court cannot be held out of the manor unless there be a custom to warrant it; and if one be held out of it without such custom, it is void, and such things there done, as are required to be done at a court, such as presentments by the homage, imposing fines, levying fines, and suffering recoveries, are void.

But, thirdly, that, as the lord may grant to, or admit a copyhold tenant, not only out of court, but also out of the manor, the grant of 1825, if it had been made by the lord, would have been good, though it purported to have been made at a void court.

Held, fourthly, that a steward cannot, in his mere character of steward, admit a copyhold tenant out of the manor.

Fifthly, that as *C. L.*, by the deed of 1823, had a special authority to make any voluntary grants, either in or out of court, as fully as the lessees of the manor could do, he might take the surrender, and make the grant in question out of the manor; and that although he professed, in making the grant, to act only as steward, and not as the special agent of the lord, the grant so made might operate as a grant made by the lord's attorney, and was therefore valid.

Sixthly, that although, in general, to make a party tenant by copy of court roll, his admission ought be notified, for the information of the tenants, at the next or some other court, and a regular entry of it made by certificate, presentment, &c.; yet, as the proceedings at this void court were entered by the steward on the court rolls, as if done at a valid court, the tenants must, at a following court, after the admittance, have had information of what had been done, and that was sufficient.

1833.

DOX dem.
LEACH
against
WHITAKER.

situate in the parish of *Bampton*, in the county of *Oxford*, which *William Henry Leach*, and *James Whalley Wickham* demised to *John Doe*. The property sought to be recovered was a mansion-house, in the parish of *Bampton* aforesaid, wherein the late *Edward Whitaker*, Esq. resided, with certain out-buildings, and a close and garden, contiguous thereto. At the trial before *Vaughan B.*, at the *Oxford* summer assizes, 1827, the jury found for the plaintiff; and also that the mansion-house, &c. were part of a copyhold, called *Hank's's*; and that the house of *William Higgins* (called the *New Inn*, in *Bampton*,) was situate out of the manor of *Bampton Deanery*. The learned Judge gave the defendant leave to move to set aside the verdict, and enter a non-suit, upon several objections raised to the plaintiff's title; and on motion made accordingly, in *Trinity* term 1828, it was ordered that the following case should be stated for the opinion of this Court: —

The premises in question are copyhold, demisable for two lives and a widow's estate by copy of court roll of the manor of *Bampton Deanery*. By lease, dated the 1st of *May* 1761, the dean and chapter of *St. Peter's* in *Exeter*, to whom the manor of *Bampton Deanery* belongs in fee, demised the manor, with the appurtenances (including therein certain demesne and copyhold lands in *Bampton*, *Aston*, *Coate*, *Chimney*, and *Clarifield*, in the county of *Oxford*), to *Jonathan Sheppard* and *Mary Frederick*, for twenty-one years from the 1st of *May* 1761 then last, at the rents and covenants therein reserved and contained. By another lease, of the 17th of *December* 1768, the dean and chapter, upon the surrender of the above lease, demised the manor to *Mary Frederick* and *John Baggs* for

for twenty-one years. By an entry on the court rolls of the 30th of *October* 1771, it appeared that, at a court leet and court baron of *J. Sheppard*, Gentleman, and *Mary Frederick*, spinster, farmers of the said manor, held before *W. Stephens*, steward, *J. Fortescue* took the premises in question of the said farmers of the manor, and that they, by their steward, gave seisin of the premises unto *J. Fortescue* by the rod, according to the custom of the manor, to have and to hold unto the said *J. Fortescue* and *Susanna Frederick* for their natural lives, and the life of the longest liver of them successively, according to the custom of the manor, yielding and paying therefore yearly to the said farmers 26s. 4d. and 7s., and all burthens, and customs, and services, therefore due and of right accustomed, and a heriot when it should happen. And the said *J. Fortescue* was admitted tenant to all and singular the said premises, but fealty was respited.

By lease, dated *December* 1775, the dean and chapter, upon the surrender of the lease of the 17th of *December* 1768, demised the manor to the said *Mary Frederick* and *John Baggs* for twenty-one years, at and under the rents and covenants therein reserved and contained.

By lease, dated 5th of *October* 1811, the dean and chapter demised the aforesaid manor and premises, with the appurtenances, to *A. E. M. Atkins*, *Edward Whitaker*, and several others, for the term of twenty-one years, at and under the rents and covenants therein reserved and contained. Pending this lease, the lessees, by writing, appointed *Frederick Whitaker*, the defendant in the present action, steward of the manor; and, also pending the same lease, it appeared, by an entry on the court rolls, that at a court baron held on the 15th of

1893.

Don dem.
LEACH
against
WHITAKER.

1833.

DOX dem.
LEACH
against
WHITAKER.

October 1812, before *F. Whitaker*, steward, the homage presented, that *W. Roberts* at that court took of the lords farmers of the manor, the premises in question therein particularly described; and that they the farmers, by their steward, gave seisin of the premises to the said *W. Roberts*, by the rod, according to the custom of the manor, to have and to hold the said premises to *W. Roberts* and *John Francis* for their natural lives, and the life of the longest liver of them successively, at the will of the lords, according to the custom of the manor, by and under the yearly rents of 26s. 4d. and 7s., payable as therein mentioned, and all burthens, customs, and services therefore due and of right accustomed, and a heriot when it should happen; and that for such estate in the premises the said *W. Roberts* had given to the said lords farmers 5s., and was admitted tenant; but his fealty and the fealty and admission of *John Francis*, were respited until, &c.

By lease, dated the 8th of *May* 1819, the dean and chapter, as well for and in consideration of the surrender of the said lease, dated the 5th of *October* 1811, made and granted by the dean and chapter unto the said *A. E. M. Atkins*, *Edward Whitaker*, and others, for the term of years then enduring, and also for divers other good causes and considerations, demised the afore-said manor and premises, with the appurtenances, to the said *A. E. M. Atkins*, *E. Whitaker*, &c., and to *E. Leader*, *N. Roberts*, and others, as joint tenants, their executors, &c., for twenty-one years from the 25th day of *March* 1818, at and under the rents and covenants therein reserved and contained, and the lessees accepted that lease.

On the 25th of *September* 1823 all the above lessees, by deed, made and appointed *Charles Leake*
steward

steward of the aforesaid manor, with full power and authority from time to time to hold courts baron and customary courts for the same manor and its members, and to do all acts usual and customary to be done by stewards in relation thereto, accounting from time to time for such fines, heriots, reliefs, forfeitures, amer-
ciaments, and other manorial profits, as should be received by him, and which should not have been ordinarily retained by the stewards for the time being of the said manor, and did especially authorise and empower the said *C. Leake* from time to time to make any voluntary grant or grants of all or any customary copyhold lands or tenements within, or holden, or parcel of the said manor, *and to give a license or licenses to demise or otherwise, as he, the said C. Leake, should think fit, and either in or out of court, as they, the lords, might or could do*; and also to appoint any deputy steward of the said manor; and also to depute any person or persons to act under him as sub-deputy steward of the said manor, as occasion might require. And they thereby ratified and confirmed all and whatsoever the said *C. Leake*, or *such* his deputy or deputies, sub-deputy or sub-deputies, should lawfully do or cause to be done in the premises.

It appeared by an entry on the court rolls, that, on the 24th of *July* 1824, at a court baron of *A. E. M. Atkins* and *E. Whitaker*, and the other farmers of the manor, holden before *C. Leake*, steward, the homage presented, that *W. H. Jones* and *J. Roberts*, by *J. L.*, their attorney for such purpose appointed, and in consideration of 5s., took of the lords farmers of the manor aforesaid the premises therein particularly described, which premises were then holden for the life of *John Francis*, surviving the before-named *W. Roberts*,

E e 3

deceased,

1833.

—
Dor dem.
LEACH
against
WHITAKER.

1833.

DOX dem.
LEACH
against
WHITAKER.

deceased, by virtue of the grant made at the court holden in and for the said manor on the 15th of *October* 1812; and that the lords farmers, by their steward aforesaid, had given seisin of the premises in question by the rod, according to the custom of the manor, to have and to hold the said premises to *W. H. Jones* and *J. Roberts*, &c., from and after the decease of the said *John Francis*, for the natural lives of *G. Whitaker* and *H. Bullen*, and the life of the longest liver of them successively, at the will of the lords, according to the custom of the said manor, at the yearly rents of 26s. 4d., and 7s., payable as therein mentioned, and all burthens, customs, and services therefore due and of right accustomed, and a heriot when it should happen; and for such estate in the premises, the said *W. H. Jones* and *J. Roberts* gave to the said lords farmers the aforesaid sum of 5s., and were by the said *J. L.*, their said attorney, admitted tenants, but their fealty was respited until, &c. And so (saving the right of the lords) the said *W. H. Jones* and *J. Roberts* were acknowledged to have taken such reversionary estate as aforesaid.

By an entry on the court rolls of the 2d of *May* 1825, it appeared that, at a special court baron of *A. E. M. Atkins* and *Edward Whitaker*, and others, lords farmers, holden at the house of *W. Higgins*, called the *New Inn*, in *Bampton*, within the manor aforesaid, before *Charles Leake*; the homage, *E. B.*, *R. D.*, and *R. W.*, being sworn, *John Francis*, *W. H. Jones*, and *John Roberts* (by *J. L.*, their attorney), customary tenants of the said manor, in open court surrendered into the hands of the lords farmers, by the acceptance of their said steward by the rod, according to the custom of the said manor, the premises therein described (being those in question),

to

to the intent that the lords farmers, might regrant the same to *W. H. Leach* and *J. W. Wickham*, to hold to them, *Leach* and *Wickham*, for their natural lives, and the life of the longest liver of them successively, at the wills of the lords, according to the custom of the said manor; to which said *W. H. Leach* and *J. W. Wickham*, the lords farmers, by their said steward, granted seisin by the rod, to have and to hold the premises in question unto the said *W. H. Leach* and *J. W. Wickham*, for their natural lives, and the life of the longest liver of them successively, at the will of the lords, according to the custom of the said manor, at the yearly rents of 26s. 4d., and 7s., payable as therein mentioned, and all burthens, customs, and services therefore due and of right accustomed, and a heriot for each of the said tenements when it should happen, according to the custom of the said manor; and for such estate, so to be had, the said *W. H. Leach* and *J. W. Wickham* gave to the lords farmers 5s., and by the said *W. Higgins*, their attorney for this purpose appointed, were admitted tenants, but their fealty was respited, until, &c.

W. H. Leach and *J. W. Wickham* were the lessors of the plaintiff. The question for the opinion of the Court was, whether they were entitled to the possession of the premises sought to be recovered: and, if the Court should be of opinion that they were so entitled, the verdict was to be entered for the plaintiff; if the Court should be of a contrary opinion, then a nonsuit.

The case was argued in *Hilary* term 1832, before Lord *Tenterden* C. J., *Littledale*, *Taunton*, and *Patterson* Js., and, by direction of the Court, re-argued(a) in last *Easter* term, by

1833.

DOX dem.
LEACH
against
WHITAKER.

(a) Before *Denman* C. J., *Littledale* and *Parke* Js.

1833.

DOX dem.
LEACH
against
WHITAKER.

Preston for the lessor of the plaintiff. It may be objected to the grant of *May* 1825, that it was made at a court held out of the manor; and, therefore, that the court being void, all the acts done at it were so. Where an act must necessarily be done in court, as a customary recovery, the validity of the court is essential to the validity of the act; but the lord may make a grant of or admittance to a copyhold in or out of court, or in or out of the manor, at what place he pleases. The grant is his act, and binds him alone. The common law as to surrenders of freehold is thus stated in *Sheppard's Touchstone*, 306: — "It is further, also, required in every good surrender, that if it be made by word and without deed, that then it be made in the same county where the land to be surrendered doth lie; but by writing a man may make a surrender of lands that do lie in any other county, and in what place soever it doth lie." So livery of seisin must be made in the land or in sight of it, so that the jury of the county may be able to try it. Here the homage is to try the validity of the grant. Now, what difference does it make to them or the public whether the grant be made in or out of court? The homage may try the validity of the grant equally well in either case. But it may be said that, although the lord might make such a grant out of the court, or even out of the manor, the steward cannot: and the fourth resolution in *Melwich's case* (a) will be cited, to shew that the steward of the court of a manor cannot, at any court held out of the manor, make grants or admittances. *Clifton v. Molineux* (b) may also be cited, to shew that the court, and all the grants and admittances made at

(a) 4 *Coke*, 26 b.(b) 4 *Rep.* 27 a.

such

such a court, are void, because the court of the manor ought to be held within it. But the decision there was a more sweeping one than the case required; and *Melwick's* case (a) was relied upon. Now, in that case (which is also reported in *Cro. Eliz.* 102.) the Court were not called upon to consider what would be the effect of a grant made at a void court, when the grant would be good even though it were made out of court. The point necessary to be decided there was, whether the lord could, at his manor of *Harbridge*, make a valid grant of tenements in *Eastworth*, they having been severed from the manor of which they had formed part. In Lord *Dacre's* case (b) (cited by Lord *Holt* in *Parker v. Kett* (c)), it was said in argument, and assented to by the whole Court, that a customary court may be held out of the manor. In *Bro. Abr.*, tit. *Court Baron*, pl. 23., it is said, "If an under-steward hold a court baron and grant copyholds to the tenants without authority from the lord or the chief-steward, it is good, because it is done in full court; but it is otherwise where it is done out of court without such authority:" and *Bro. Abr.*, tit. *Tenant per Copy of Court Roll*, pl. 26., is to the same effect. That shews that an authority to make the grant will be implied where the under-steward appointed by the lord makes it in full court; but where he makes it out of court, no such authority will be implied. In *Watkins on Copyholds*, tit. *Grants*, p. 29., it is said, "In order to enable the steward to grant, it is not enough that he be steward de facto, he must have a lawful authority;" and in page 30., "The bailiff of a manor cannot, as such,

1833.

DOX dem.
LEACH,
against
WHITAKER.

(a) 4 *Rep.* 26 b.(b) 1 *Leon.* 289.(c) 12 *Mod.* 472.

make

1833.

Doz dem.
LEACH
against
WHITAKER.

make a grant by copy; for such a power does not appertain to his office, which was instituted for other purposes;" and he then says, "It is said that an under-steward cannot grant out of court, without a special authority or custom enabling him so to do." But these dicta shew that, if there be a special authority or custom, it is sufficient. The whole question is, as to the authority. A steward, as incident to his office, may take a surrender out of court, or even out of the manor. What difference is there, whether it be a surrender or admittance? The court, merely as such, adds no efficacy to the grant: the efficient part is the delivery of seisin. But, further, if the lord may make a grant out of court, and out of the manor, he may authorise his steward to do so: and here the lords farmers, by the deed of *September 1823*, gave *C. Leake* a special authority to make grants, either in or out of court, as fully as they could do. He therefore had power to grant in or out of court, or in or out of the manor; and the grant, when made, enures, and may be pleaded as a grant by the lord; not merely, as it imports, by the steward. In early times instruments could operate only in the precise way pointed out by the parties; but now, where a deed cannot operate in the way contemplated by the parties, it will be construed so as to effectuate the intention, if possible, in some other way. *Osborn v. Churchman* (a), *Marshall v. Frank* (b), *Goodtitle v. Bailey* (c). So, here, the grant made by the steward at a void court may operate and

(a) *Cro. Jac.* 127.
(c) *Cowper*, 597.

(b) *Gilbert's Eq. Rep.* 143.

enure as a grant made by the lord. The objection, that two rents are reserved, without distinguishing how much is payable for each tenement, cannot prevail, for the same rents were reserved in the grant of 1771; and it may, therefore, be intended that such distinct rents have always been reserved. Then, as to the heriots: by the grant, a heriot is reserved for each tenement, when it shall happen, according to the custom. If a heriot is not due for each tenement by such custom, it cannot be claimed.

Scriven Serjt. contrà. The grant of the 2d of *May* 1825 is void for the following reasons: — First, because it was made on the surrender of *John Francis*, the survivor named in the grant of the 15th of *October* 1812, and it does not appear that he ever was admitted the lord's tenant. Secondly, because the court at which it was made was void, inasmuch as it was held out of the manor, and therefore all the acts done at it were void. Thirdly, a steward, even though he has a special authority to make grants out of court, cannot make a grant out of the manor. Fourthly, no authority was given to the steward, beyond that of doing the acts usually done by a steward in court and out of court. Fifthly, the grant, even if it could be considered an act done out of court, was void and inoperative for want of presentment and enrolment of it at a subsequent court, legally holden within the manor. And, sixthly, it is void for want of reservation of the usual services. As to the first point, the grant is void because it is made on the surrender of *John Francis*, who had no title to the copyhold, never having been admitted.

1833.

DOE dem.
LEACH
against
WHITAKER.

1833.

—
 DOR DEM.
 LEACH
 against
 WHITAKER.

admitted. Secondly, the court held by the steward out of the manor is void. The following authorities shew that a steward cannot grant or admit at a court held out of the manor. *Melwich's case* (a), fourth resolution, recognised in *Clifton v. Molineux* (b); the duke of *Suffolk's case*, cited by *Popham J.* in *Sands v. Drury* (c); *Co. Litt.* 58 a.; and *Gilbert's Tenures*, 250 (d). In *Marke v. Sulyard* (e), a copyhold granted at a court out of the manor was confirmed in equity against the lord who made it; so that there the party was compelled to seek relief in equity even against the lord by whom the grant was made. In 1 *Watkins*, 252., under the head of "Admission," it is stated, that "as the presence of the tenants is not necessary on the admission of a copyholder, the lord or steward may admit out of court as well as in." And afterwards, in p. 253., "It is acknowledged that the lord himself may admit out of the manor; and though it is said that a steward cannot do so, yet most of the cases evidently suppose such admission to have been at a court held out of the manor. Now, it is clear that a court cannot be held out of the manor, unless it be by special custom, as where a court is held in one manor for a whole honour in which there are several manors; and therefore this reasoning does not apply to an admittance merely as an admittance, as an admittance may most certainly be out of court. And as to the case of *Tukeley v. Hawkins* (g), so far as it relates to this point, it seems to be completely answered by the

(a) 4 Rep. 26 b.

(b) 4 Rep. 27 a.

(c) Cro. Eliz. 814.

(d) See all these authorities referred to in the judgment.

(e) Tothill, 45. edit. 1820.

(g) 1 Ld. Raym. 76.

reasoning

reasoning in that of *Dudfeild v. Andrews* (a), which appears to apply as strongly to an admittance as to a surrender." Now, *Dudfeild v. Andrews* is an authority only to shew that a steward may take a surrender out of the manor as well as out of court; and it is conceded he may do so out of the manor (b): but there is a distinction between a grant and an admittance. The admittance completes the title, but the surrenderee takes only from the surrenderor. A grant supposes the estate to have got back to the lord, and to be re-united to the manor. The lord may, perhaps, authorise the steward to grant, but the grant alone is not legally operative. If the lord himself granted out of court and out of the manor, and delivered the rod, or accustomed symbol, the delivery of the symbol would be equivalent to livery of seisin under a feoffment; but, nevertheless, the grant would be only an inchoate act until enrolment, and would not alone be legally available. Secondly, conceding that acts done at a court held out of the manor are good as acts done out of court (which seems contrary to the decision in *Clifton v. Molineux* (c)), and that the lord himself may admit or grant out of the manor, the steward cannot even admit out of the manor: and, supposing that an authority may be given by the lord to the steward to do acts, not only out of court, but even at a void court, here no authority was given to the steward to make voluntary grants out of court: and without a special authority, a steward can only perform acts ministerially in court. The steward here was empowered "to make any voluntary grant of customary or copyhold lands or tene-

1893.

Don dem.
LEACH
against
WHITAKER.

(a) 1 *Salk.* 184.(b) Note 387. to *Co. Litt.* 58.(c) 4 *Rep.* 27 a.

ments,

1838.

Dox dem.

LEACH

against

WHITAKER.

ments, and to give a license or licenses to demise or otherwise, as he should think fit, and either in or out of court, as fully as the lords might or could do." Now, the words, "*either in or out of court*," apply only to the giving of licenses. It is usual for the lord and steward to grant licenses, or dispensations of forfeiture, out of court, and beneficial that it should be so; but it is not necessary that grants should be made out of court. Assuming, however, that the deed of 1823 gave *C. Leake* an authority to make grants out of the manor, as the special agent or attorney of the lords farmers, the grant in question neither was, nor purported to have been, made in pursuance of that authority: it professes, on the face of it, to have been made by *C. Leake*, acting in his character of steward, at a court where the homage were sworn; it cannot operate, therefore, as an execution of the special authority given to *Leake* to make grants as the lord might do. But, further, a grant made out of court, with delivery of the rod or other symbol of investiture, is not legally operative until certified and enrolled at a legal court, so as to form part of the rolls of the manor: *Calthrop's Readings* (a), p. 36, 37. Therefore, even if the grant can be considered as an act done out of court, still the plaintiff had no legal title at the time of bringing the ejectment, inasmuch as the grant of 1825 had never been presented and enrolled at any court legally holden, so as to constitute the grantee tenant by copy of court roll. The nature of the tenure requires that every act should be entered on the roll of the court. If the court at which the acts were done was void, then the

(a) Printed with *Coke's Copyholder*, 5th edit. 1650.

acts should have been presented and enrolled at some subsequent court: but here no court was held subsequently to the void court at which the grant was made. In *Kitchin on Copyholds*, 165. it is said, "The high steward may admit out of the court by special usage and custom within the manor used; for one which holds by copy of court roll ought to have his estate entered in the court roll, and his admittance to be entered in the court; and for that, if the under steward or the high steward which hath no patent, as above, take surrender out of the court, and present that in court, and the tenant be in the court admitted, it is good, for it is the lord, by his steward, hath admitted, and the admittance makes a copyholder, and the entry of that in court makes him tenant by copy of court roll; for copyholder is he which holdeth by copy of court roll." In *Co. Copyholder*, s. 46. it is said, "The power of the steward goeth beyond the power of the under-steward, that the steward can make an admittance out of court, and it shall stand good if entry be made in the court roll, that he that is admitted hath paid his fine, and hath done fealty; but the under-steward, though he may take a surrender out of the court, yet he cannot make any admittance out of court without special authority or particular custom." In *Watkins*, vol. i. p. 81., it is said, "If admittance be immediately made by the lord or steward taking such surrender, yet such admittance should be regularly notified at the next court day, for the information of the tenants. This, too, was more immediately necessary in ancient days, as, in case the tenants should have known any objections to the person so admitted, of which the lord might have been ignorant,

1833.

DOE dem.
LEACH
against
WHITAKER.

1833.

Doc dem.
 LEACH
 against
 WHITAKER.

ignorant, they might have informed him of them; from which he might have been induced to resume the estate, as having conferred it on a person who was unworthy of the grant. Add to this, that it must be regularly inserted on the court rolls of the manor, by a copy of which he is to hold." And it has been held that a surrender out of court to the use of his will, made by the surrenderee of a copyhold before his admittance, is of no effect, and cannot be made good by his subsequent admittance: *Doc v. Tofield* (a). [*Littledale J.* You apply your argument, also, to grants by the lord himself.] They are not evidence of title until they are entered on the roll. [*Littledale J.* Suppose there be a distinction as between grants made by the steward and by the lord; a private individual may make an attorney for special purposes: and may not the instrument of *September 1823* be considered a general power of attorney to act for the lord in these matters?] It might, but the grantee would not become a copyholder by the delivery of the mere symbol, unless there were evidence of the grant on the manor rolls. There can be no legal evidence of a grant without shewing that it has received the character of a court roll. The delivery of the symbol would not alone be evidence of the seisin. So a feoffment could not be proved by a person merely having seen livery of seisin.

But, again, the grant is void for want of the reservation of the usual services. First, two rents are reserved, without distinguishing how much is payable for each tenement; and, secondly, a heriot is reserved for each tenement, whereas one heriot only was reserved

(n) 11 *East*, 246.

by the grants of 30th of *October* 1771, 15th of *October* 1812, and the 24th of *July* 1824.

1833.

DOX dem.
LEACH
against
WHITAKER.

Preston, in reply. It was unnecessary for *Francis*, who was the grantee in reversion by the copy of 1812, to be admitted tenant. *Roe dem. Cosh v. Loveless* (a) is express on that point. Then, assuming that a grant made by a steward at a court held out of the manor is void, and that the grant in question cannot operate as a grant made by the steward; still, in order to effectuate the intention of the parties, it may operate as a grant made by *C. Leake*, acting as the agent of the lords farmers, in pursuance of the special authority given to him by the deed of 1823. And the grant, being made by the steward in execution of these powers, is entered, in fact, upon the court rolls. To say that the rolls in the particular instance are not those of an actual court, is no objection. They are documents for the information of the lord. It is for him to see whether or not the steward has properly exercised his powers. There is no ground for saying that the authority to the steward is only to grant licences in or out of court. [*Littledale J.* The language of the instrument is perfectly clear as to that point. *Parke J.* The last words are not confined in construction to the last antecedent.]

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—The question to be considered

(a) 2 B. & A. 453.

1893.

—
 DOR DEM.
 LEACH
 against
 WHITAKER.

is, whether the verdict can be sustained on the demise of *W. H. Leach* and *J. W. Wickham* (a), who were admitted as customary tenants of the premises in question on the 2d of *May* 1825.

The objection is, that the grant of the 2d of *May* 1825 is void: First, because it was made on the surrender of *John Francis*, the surviving life in the copy of the 15th of *October* 1812, and the grantee in reversion; and it was not shewn that *John Francis* was admitted the lords' tenant, although his admission was expressly reserved by the grant of the 15th of *October* 1812: secondly, because the grant was voluntary, and no authority was shewn in the steward of the manor to make such a grant: thirdly, because the Court was held out of the manor, though expressly alleged in the grant to be held within it: fourthly, because two rents are reserved without distinguishing the particular tenements liable thereto respectively, and because a heriot for each tenement was reserved by this grant, whereas one heriot only was reserved by the grants of the 30th of *October* 1771, the 15th of *October* 1812, and 24th of *July* 1824.

As to the first of these objections, that *John Francis*, the surviving life in the copy of the 15th of *October* 1812, is not shewn to have been admitted the lord's tenant, although his admission was reserved by the grant of the 15th of *October* 1812, we are of opinion that there was no necessity for a formal entry of the admission of *John Francis*. The case of *Roe on the demise of Cosh v. Loveless* (b) is not exactly in point as

(a) There was another demise, on which judgment went by default.

(b) 2 B. & A. 453.

to this question, yet the principles there laid down will be found applicable to this question. It was an ejectment for copyhold premises. The plaintiff, in support of his case, produced a copy of the court rolls of the manor, dated the 13th of *June* 1789, by which it appeared that *Richard Kiddle* and *Sarah* his wife took of the lord the reversion or remainder of and in the premises in question therein described as being then in the tenure of them, the said *Richard Kiddle* and *Sarah Kiddle* his wife, to have and to hold to *James Cosh*, aged nineteen years, for the term of his natural life, at the will of the lord, according to the custom of the said manor, immediately after the death, surrender, or forfeiture of the said *R. Kiddle* and *S. Kiddle* his wife, by yearly rent, &c.; and the said *R. Kiddle* and *S. Kiddle* gave to the lord, for a fine, 37*l.* 12*s.*, and it was granted in form aforesaid. The plaintiff then proved the death of *R. Kiddle* and his wife. It was objected, on the part of the defendant, that the admittance of *Cosh* ought to have been proved, to give him the legal title. The judge directed the jury to find for the plaintiff, reserving liberty to the defendant to move to enter a nonsuit. In giving judgment upon this case, Lord Chief Justice *Abbott* says, that, "by the general law of copyhold, the lord has a right to insist that the tenant shall come in to be admitted, and do fealty and homage;" and, after some other observations, he goes on: "but where the lord makes an original grant, no admittance to a copyhold, conformable to the custom of the manor, seems necessary, except in cases analogous to those where livery of seisin would be requisite in the grant of a freehold. Now a feoffment is not effectual till livery

1833.

Don dem.
LEACH
against
WHITAKER.

1839.

—
 DOR dem.
 LEACH
 against
 WHYTAKER.

of seisin takes place; but a freehold may be granted in reversion without any livery of seisin, and, therefore, reasoning by analogy from the grant of a freehold, it seems to me that the grantee of a copyhold in reversion has a good and perfect title by the grant without admittance; and that being so, he may take possession on the death of the tenant for life."

And, without more particularly noticing the opinions of the other Judges, we think the principles upon which that case was determined warrant us in saying that there was no necessity for *John Francis* to be admitted.

As to the objection, that two rents are reserved without distinguishing how much is payable for each tenement, we think that no ground of objection: the rents are the same as reserved in the year 1771, and no distinct objection is stated to the rents being so severed, and we cannot intend but that they may always have been so.

Then with regard to the heriots; a heriot for each tenement is reserved when it shall happen; if the circumstances do not occur that a heriot is demandable for each tenement, the claim cannot be enforced, but it does not make the grant void.

The principal objection is, that the grant of the premises in question was made at a court held before the steward out of the manor. And it is contended, that any court held out of the manor is a void court, and all the proceedings in it are void also; and even if it were not a void court, or if the lord himself could grant out of the manor, independent of the court, still the steward could not do so.

The first question then is, whether a copyhold court
 can

can be held out of the manor. It seems to be quite clear, that a court baron of freeholders cannot be held out of the manor.

In *Co. Litt. 58 a.* it is said, "The court baron must be holden in some part of that which is within the manor; for if it be holden out of the manor, it is void, unless a lord, being seised of two or three manors, hath usually, time out of mind, kept at one of his manors courts for all the said manors; then by custom such courts are sufficient in law, albeit they be not holden within the several manors. And it is to be understood that this court is of two natures. The first is by the common law, and is called a court baron, as some have said, for that it is the freeholder's or freeman's court, (for barons in one sense signify freemen) and of that court the freeholders, being suitors, be judges; and this may be kept from three weeks to three weeks. The second is a customary court, and that doth concern copyholders, and therein the lord or his steward is the judge."

In *Clifton and Molineux's case (a)*, it was resolved, "that if a court be held by the steward of a manor out of it, and divers grants and admittances there made, the court and all grants and admittances are void, for the court of the manor ought to be held within the manor, and not out of the jurisdiction of it, which agrees with the resolution of the fourth point before in *Melwiche's case*. But it was resolved that by custom the court may be held out of the manor, and grants and admittances made there good enough, as divers abbots, priors, &c., used to

1833..

DOX DEM.
LEACH
against
WHITAKER.

(a) 4 Co. 27 a.

1838.

DOE dem.
LEACH
against
WEIRAKER.

hold courts at one manor for divers several manors, and good by custom."

The case of *Melwiche* is reported in *Cro. Eliz.* 102., and the matter seems to have been compounded; and it is again mentioned in *Bright v. Forth* (a), and is there mentioned as a strange judgment; but the case in *Cro. Eliz.* appears rather to have been upon the freehold of the copyholds being divided from the rest of the manor, and the effect which that would have upon the copyholds. In *Sands v. Drury* (b), in giving judgment, it was said that it was adjudged in the time of Queen *Mary*, in the case of the Duke of *Suffolk*, that where one had two manors, and granted a copyhold of the one manor, at the court of the other manor, it was a void grant; for it cannot be a copyhold according to the custom of a manor whereof it is not parcel. But *Gaudy* doubted thereof, and considered it would have been well enough if it had been so used from time whereof &c; but that was not found, and therefore no title in the defendant.

But in Lord *Dacre's* case (c), it was held that a customary court may be held out of the precinct of the manor, for no pleas are holden, which was agreed per totam curiam. But this was not the point in discussion, which was as to the appointment of a steward. The reason, also, there given, does not seem to be a good one, for the holding of pleas is not the only reason why it should be held within the manor. And in fact the court does hold pleas of land, as fines levied, and recoveries suffered in the copyholders' court.

(a) *Cro. Eliz.* 442.(b) *Cro. Eliz.* 814.(c) 1 *Leon.* 289.

It would be attended with the greatest inconvenience if suitors were compelled to go a great distance to attend the court; and if proclamations were made affecting the copyhold tenants, they would not necessarily know of them, if they were made off the manor.

1886.

DOE dem.
LEACH
against
WHITAKER.

We do not enter into any consideration of the cases where the freehold of the copyholds has been severed from the manor; a good deal of uncertainty seems to prevail as to them, and whether courts may be held off the manor for the admittance of the copyhold tenants: they stand upon their own particular circumstances.

This question has engaged the attention of Chief Baron *Gilbert*. In his *Treatise on Tenures*, p. 250., he says: "A lord may make a grant or admittance of a copyhold out of the manor, at what place he pleases; but the steward cannot at a court held off the manor make any grants or admittances; and in 1 *Coke Inst.* 58. a., he says that a court baron cannot be held off the manor unless the lord hath two or three manors, and hath usually kept court at one for all, which plainly shews that a lord cannot make admittances or grants at a court held off the manor, no more than the steward. For *Coke* says, that if the court baron be held off the manor, it is void, and he there speaks of a court baron as including the copyholders' court, where the steward is judge. But, as hath been said before, a lord may make admittances or grants out of the manor, at what place he pleases, which are *Coke's* words, and must be understood not at a court, but at some other time, or else he contradicts himself. It is held, that if the inheritance of copyholds be granted to one, he may hold courts where he will; for it is no longer

1833.

Dec dem.
LEACH
against
WHEAKER.

a court baron, and that the lord or his steward may grant copies out of court as well as in court. And as the case is reported by *Croke*, the grant was at a court held at another manor. But, as *Coke* reports it, though the grant be at another place, yet it is not said to be done at a court. So quære, whether a steward may make grants by copy out of court; but if a steward can, an under-steward cannot." And in page 319. he says: — " My Lord *Coke* says, that the lord may make admittances and grants by copy at what place he pleases, but the steward of the manor at any court held off the manor (for out of the court it is said by him, in another place, he may make admittances and grants by copy), cannot make any admittances or grants by copy. This seems to imply that the lord may make by copy, grants and admittances, at a court held off the manor, or else where is the difference between the case of the lord and the steward? and in the next case but one it is resolved, that if the steward at a court held off the manor make any grants or admittances, they are all void; but he says nothing of the lord. In his comment upon *Littleton* he says, the court baron must be held upon the manor, else it will be void. As *Melwiche's* case is reported by *Croke*, it is there said, that if the lord grant away the freehold of his copyholds, the grantee may hold courts where he will to make admittances and grants. If then a grant by copy or admittance should be made at a court held off the manor, though it be a court baron, why should it be void? since a court baron contains in it two courts, one for the freeholders, the other for the copyholders; and since that for the copyholders as to granting copies, &c., may be held off
the

the manor, there is no reason that because the court baron is void, that therefore the admittance should be void; for they are as two distinct courts, and the admittance had been good, had the court been only the copyholder's court. And if we look back to the reason of the thing, if an admittance may be made at a place off the manor, why not at a court held off the manor? for it is no judicial act; if it were, surely it must of necessity be done in court; and therefore it was held per totam curiam, that a court to do these things might be held off the manor: it is not distinguished in this case between the grant of the lord or steward: but *Coke* is express that grants by stewards at courts held off the manor are void. *Ideo quære de hoc?*"

Taking the whole of these authorities into consideration, though there is some want of clearness among them, we think that a customary court cannot be held out of the manor, unless there be a custom to warrant it. But though the court be a void court, that only affects such things as are required to be done at a court, as presentments by the homage, imposing fines and amercements, levying fines, suffering recoveries, &c.; but as to many other things, though they are correctly done at a court, it is not essential they should be so. And amongst these things it has been held, that the lord may grant to or admit a copyhold tenant, not only out of court, but also out of the manor: the fourth resolution in *Melwiche's* case (a). It was, therefore, competent for the lord himself to have admitted, or made a grant to these persons out of the manor, with-

1833.

Don. de. de.
Leach.
Ogden.
Warrington.

(a) 4 Co. 26 b.

1833.

—
 Doc dem.
 LEACH
 against
 WHITAKER.

out any consideration of a court, and if he had gone alone to this house, and these persons had come there, he might have made out a grant to and admitted them, and have delivered seisin by the rod, and thus have completed two of the ingredients towards making them tenants by copy of court roll. But, supposing instead of that, either by mistake as to the house not being within the manor, or under other circumstances, twenty or thirty persons, one of whom called himself the crier, some others bailiffs, beadles, or officers, and some homagers, had assembled there about the lord, and the crier had made proclamation to open a court, and had sworn persons to be of the homage, and the lord had given a charge to those persons as the homage, and they had made presentments, and had imposed fines and amercements, and fines had been levied and recoveries suffered, all which would have been void; and then these lessors of the plaintiff had offered themselves to receive a grant, and the lord had made and signed a grant and admitted them, and had delivered seisin by the rod;—the question is, whether all this machinery of a court would have invalidated the grant, or whether it would have been mere surplusage, and the grant and seisin remained valid; and we are of opinion that as there are effectual words of grant, and an actual seisin delivered, all this statement about the court is only to be considered as surplusage, and that the grant and seisin would be effectual. Thus, therefore, it would be if the lord himself had made the grant.

But the grant itself, or admittance, not being made by the lord in person, it is necessary to consider whether

ther it was made by an authorised person. And the first question upon that is, whether the steward of a manor can admit out of the manor. It should seem that he may take a surrender out of the manor, *Howsego v. Wild* (a). And so it would appear by *Dudfield v. Andrews* (b). It is so taken in *Tukely v. Hawkins* (c), and the Court say that a custom to the contrary would be void. That is perhaps going a good way, for in *Dudfield v. Andrews* it is only by reasoning and queries that it is thought proper the steward should have such a power. But as to an admittance out of the manor, *Tukely v. Hawkins* (c) is express that the steward cannot admit out of the manor. And the fourth resolution in *Melwicke's case* (d) and *Clifton v. Molyneux* (e) are to the same effect, though in these cases it is said that the steward cannot admit *at a court* held out of the manor. *Watkins*, in his *Treatise on Copyholds*, vol. i. p. 253., seems to incline to the opinion that a steward may admit out of a manor; but it is only by putting queries and reasoning that he supports that opinion. But we are of opinion that a steward cannot, in his mere character of steward, admit out of the manor.

But, in the present case, *Leake*, who made the grant, derived his authority from the deed of the 25th of September 1823, by which the lessees of the lord of the manor appointed him steward of the manor, and besides giving him the usual powers and authorities to hold courts, and to do all acts usual and customary to be done by stewards, they more especially authorised and

1833.

Don dem.
LEACH
against
WATKINS.

(a) 1 Roll. Abr. 500. F. 3.

(b) 1 Salk. 184.

(c) 1 Ld. Raym. 76.

(d) 4 Rep. 26. b.

(e) 4 Rep. 27. a.

empowered

1833.

—
 DUE DEM.
 LEACH
 against
 WRETFAX.

empowered him from time to time to make any voluntary grant or grants of all or any customary or copyhold lands or tenements within, or holden, or parcel of the said manor, and to give a licence or licences to demise or otherwise as he, the said *Charles Leake*, should think fit, and either in or out of court, as fully as they might or could do. . And though, from one part of the instrument, it seems doubtful whether the powers conferred upon him are not merely an enlarged explanation of what his duties are as mere steward, yet, upon the whole of the instrument, we think it amounts to putting *Leake* in the capacity of attorney to represent the lord as to surrenders, grants, and admittances, and that whatever the lord might do *Leake* might do also, and that he therefore might take the surrender and make the grant in question off the manor. But it may be said that *Leake*, in the document, does not profess to act as the general attorney of the lord, but only as steward; and that, as steward alone, he could not make the grant: but, as to that, he had the authority; and, as in common parlance he would be called steward, who is generally taken to represent the lord as to copyhold matters, we think the calling himself steward is sufficient, and that it was not necessary to say that he acted as the general attorney of the lord.

But, besides making the grant or admittance and delivery of seisin, it is necessary, in order to make the person tenant by copy of court roll, that the admission should be notified for the information of the tenants at the next court, or some other court, according as the custom of the manor may be; and an entry of it should be made, either by a certificate of the lord, or the steward,

steward, or presentment by the homage. None of these have been done: but then the proceedings at this supposed court are entered by the steward in the court rolls as if done at a court, and therefore at the following court after the admittance, the tenants have information of what has been done, through an incorrect medium, but we think it sufficient.

An objection may be made, that nothing done at this supposed court should be allowed to have any effect, as it has a tendency to create a custom to hold a court out of the manor; but, if such were adopted again, it is probable the tenants would object to it: this supposed court could be no evidence of such a custom, because, if the court rolls were produced, it would appear that the court was held within the manor. Besides, even if it had a tendency to introduce such a custom, we do not think that it could affect the validity of the admittance if it were otherwise sufficient.

Upon the whole of this case, although this irregular proceeding has brought the parties into considerable difficulties, we think they may be got over; and that the lessors of the plaintiff are entitled to judgment.

Judgment for the lessors of the plaintiff.

1838.

Don dem.
LEACH
against
WHITAKER.

1853.

The KING *against* The Trustees of the CHESHUNT Turnpike Roads.

Mandamus lies to admit a clerk of trustees under the general turnpike acts.

A RULE nisi had been obtained for a mandamus to the above trustees, to admit *Richard Jordan* into the place and office of their clerk.

F. Pollock and *W. H. Watson* shewed cause (June 11th) against the rule, which was supported by the *Solicitor-General* and *Sir James Scarlett*. In opposition to the rule it was argued that a clerk to turnpike trustees had not, by the general turnpike acts (under which these roads were managed), such a tenure in his office, as could render it properly the subject of a writ of mandamus. On the other hand it was urged that under the provisions of the acts, and particularly 4 G. 4. c. 95. s. 43. and 9 G. 4. c. 77. s. 15., the clerk had a valuable estate in his office; that by 4 G. 4. c. 95. s. 39., the order appointing such clerk could not be revoked without certain notices and formalities, nor without the assent of a greater number of trustees than concurred in making the order; and that the case was entirely different from that of a vestry clerk, (*Rex v. The Churchwardens of Croydon*) (a), who had no lasting interest in his office, but might be elected merely pro hac vice.

The Court, on consideration of the clauses referred to, and particularly on a comparison of sections 43 and

(a) 5 T. R. 713.

39 of 4 G. 4. c. 95., were of opinion that a mandamus lay; and they consequently made the rule absolute (a).

1833.

(a) In *Hilary* term 1829, the Court granted a rule nisi for a mandamus to the trustees of the *Hinckley* turnpike roads (*Berkshire*) to admit certain persons to the office of clerks to the said trustees. Cause was shewn in *Trinity* term following, and the Court directed the matter in dispute to be tried on a feigned issue, which being found against the prosecutors of the mandamus, the rule was ultimately discharged with costs.

The King
against
The Trustees of
CHESHIRE
Roads.

The KING *against* The Justices of CHESHIRE.

Wednesday,
June 12th.

A RULE had been obtained, calling upon the justices to shew cause why a mandamus should not issue, commanding them to enter continuances and hear the appeal of *Richard Oxtou* against an order of two justices, dated the 11th of *February* 1833, by which he was required to pay *Sir Thomas Stanley Massey Stanley*, Bart., 72*l.* 5*s.*, being double the value of goods fraudulently removed by the said *R. O.* to prevent their being distrained for rent due to the said *Sir Thomas*. It appeared by affidavit that an order was made as above upon the said *R. O.*, pursuant to 11 G. 2. c. 19. s. 4., under the hands and seals of two justices, who, on the same day, gave *R. O.* a copy of the order. He appealed against it, first giving the justices due notice. The appeal was entered on the third day of the sessions; the last day, according to the practice there, for entering appeals. The original order was defective in point of form. On *Monday*, the first day of the sessions, the two justices caused a new and different order (but not varying as to the facts or nature of the offence) to be filed with the clerk of the peace, giving notice of it on the same day to the appellant. The appeal came on to be heard on the *Saturday*, and the appellant handed in the

An adjudication of justices under 11 G. 2. c. 19. s. 4. (inflicting penalties for fraudulently removing goods to avoid a distress,) is an order, and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form.

1833.

The King
against
The Justices of
Chester.

the original order, and proved his notice of appeal; but the respondents contended that the second order was the only one of which the Court could take notice; and the sessions so held. The new order was then confirmed without opposition (a).

(a) The original order was intended to follow the precedent (No. 9.) in 1 *Chitty's Burn*, p. 1009., tit. *Distress for Rent*, xxi., but was inaccurately framed. The amended order was as follows:—

"Whereas T. W. of P., in the county of Chester, Gent., agent for and on behalf of Sir Thomas S. M. Stanley, Bart., did, on, &c. at, &c., duly make and exhibit before me the Rev. R. M. F., clerk, being one of his Majesty's justices, &c. residing near the place whence the goods and chattels hereafter mentioned were removed, and not being interested in the premises hereinafter mentioned whence the same were removed, his complaint and information in writing against R. O. of, &c. labourer, thereby setting forth," &c. (stating the charge laid in the information, viz. that one W. O. was indebted to Sir T. S. M. S. for rent of certain premises occupied by the said W. O., and that the said rent being in arrear R. O. did wilfully and knowingly assist him in fraudulently removing from the premises six cows, the goods and chattels of the said W. O., being under the value of 50*l.*, and of the value, &c. with intent to prevent their being distrained for the said rent.) "And thereupon the said R. O. being duly summoned to appear before two of his Majesty's justices of the peace in and for the county of Chester, on, &c. at, &c. to answer the said complaint and information; and the said R. O. having appeared accordingly before us the said R. M. F. and the Rev. U. C., clerk, being two of his Majesty's justices, &c.: now we the said justices residing, &c. and not being either of us interested, &c. in the presence of the said R. O., having heard and examined the witnesses produced by the said T. W. upon oath (we the said justices having then and there full power and authority to administer the oaths to the said witnesses) touching the said complaint and information, and having heard what was alleged by the said R. O. in his defence, and having also enquired in better manner upon oath the value of the said cows, and upon due consideration had in the premises, do hereby adjudge that the said R. O. is guilty of the offence with which he is charged in and by the said complaint and information, according to the form of the statute, &c.; and the said justices do adjudge and order the said R. O. to pay to the said Sir T. S. M. S., Bart., the sum of 72*l.* 5*s.*, being double the value of the said cows, goods, and chattels in the said complaint mentioned, on or before the 18th day of February now next, &c. In witness whereof we the said justices to this order have put our hands and seals, at, &c. on," &c.

Signed and sealed by the two justices.

Col-

Cottingham now shewed cause against the rule. Justices may return a conviction to the sessions in a more formal shape than that in which it was drawn up, although a copy has been delivered to the party convicted, *Rex v. Barker* (a); and the copy so returned to the sessions is the only one which that Court ought to notice, *Rex v. Allen* (b). The instrument returned here, is drawn up as an order, because the statute so directs, but it is in substance a conviction. [Parke J. The moment the justices have put their hands and seals to it, meaning it to be an order, it is one, and must be subject to the same rules.] Being substantially a conviction, it is within the reason of *Rex v. Barker* (a), and ought, like a conviction, to be returnable in an amended form. The error here, in the original instrument, was a mere mistake, and if it could not have been corrected, the sessions would have had to adjudicate upon an order which was absurd on the face of it. [Denman C. J. They must have done so if it was the order appealed against. If an order of removal were absurd, could a new one be filed at the sessions? The absurdity of the instrument cannot increase the power of the justices. Patteson J. In *Rex v. Bissex* (c) it was expressly held that an instrument of this kind was to be treated as an order, and not as a conviction.]

1833.

—
The King
against
The Justices of
Cheshire.

Whitcombe, *contra*, was stopped by the Court.

DENMAN C. J. The strongest point in favour of the respondents is, that the statute directs the justices to

(a) 1 East, 186.

(b) 15 East, 333.

(c) 1 Chitty's *Burn*, 985. note (a), tit. *Distress for Rent*, V. *Sayer's Rep.* 304.

1833.

The King
against
The Justices of
Cheshire.

determine whether or not the person be guilty, which certainly makes the proceeding very like a conviction. But still the adjudication is to be by *an order*. One distinction between an order and a conviction is decisive; namely, that, in a conviction, evidence is set out, upon which the court of appeal is to form a judgment: in an order, none is stated. The document here is only an order; and the consequence is, that the party affected had a right to appeal against it in the form in which it was made. The rule must be absolute.

LITLEDALE, PARKE, and PATTESON Js. concurred.

Rule absolute.

Wednesday,
June 12th.

The KING *against* The Duke of BEAUFORT.

A custom for the jurors of a court leet holden for a borough and manor, to present persons to be admitted burgesses of the borough, and for the persons so presented to be admitted and sworn in burgesses, was held, on motion in arrest of judgment, to be valid in law.

MANDAMUS to the defendant, lord of the borough and manor of *Loughor*, in the county of *Glamorgan*, and to the steward and port-reeve, recited that the borough and manor of *Loughor* was an ancient borough and manor, and, by immemorial usage and custom used in the borough, the jurors of the court leet holden for the borough and manor of *Loughor* have and exercise, and of right ought, &c. the privilege and authority of presenting persons to be admitted burgesses of the said borough; and by such immemorial usage and custom the persons so presented by the jury to be admitted burgesses have been used to be and of right ought to be sworn in by the steward of the borough and manor, and admitted burgesses thereof; and further recited that

that one *T. Walters*, on the 2d of *May* 1828, was, by the jury of the court leet holden for the borough and manor, presented as a fit person to be admitted a burgess of the borough, and in respect thereof, according to such immemorial usage and custom, had a right to be sworn in and admitted a burgess of the borough, and that he had, since such presentment, demanded to be sworn in and admitted, but had been refused: it then commanded the defendants to cause him to be sworn in and admitted. The lord and steward, after denying the custom stated in the mandamus, returned, as the immemorial custom used in the borough, that "all persons admitted or claiming to be admitted burgesses have been and ought to be presented by the jurors, previous to their being admitted and sworn as burgesses of the borough; but that no person by the said jurors presented to be such burgess has been or ought as of right to be sworn and admitted a burgess, except persons being sons of burgesses of the borough, born after their fathers have been sworn in burgesses, and persons married to the daughters of burgesses, born after their fathers have been so sworn in, and persons having served apprenticeships for the term of seven years to burgesses of the borough, residing during such apprenticeship within the borough, and which persons have been used and ought to be thereupon duly presented by the said jurors to be admitted burgesses of the borough. The return then stated that *Walters* did not come within any one of those classes of persons, and that he was not qualified to be admitted a burgess on any presentment of the jurors, and that he was not duly presented by the jurors to be of right thereupon

1833.

The King
against
The Duke of
BEAUFORT.

1833:

—
The King
against
The Duke of
Beaufort.

admitted. The return of the port-reeve is not material. The prosecutor, by his plea, denied that the custom was limited, as in the return was alleged; and upon that issue was tendered and joined. At the trial before *Alderson J.*, at the Spring assizes for the county of *Glamorgan*, 1832, the jury found a verdict for the crown. A rule nisi was afterwards obtained to arrest the judgment, upon the ground that the custom stated in the mandamus was bad, inasmuch as the effect of it was to constitute the leet jury of the borough and manor of *Loughor* electors of the freemen for that borough, which jury might possibly consist of persons, none of whom were corporators, or even inhabitants of the borough.

E. V. Williams in this term shewed cause. The custom stated in the mandamus is good. In *Rex v. Rowland (a)*, a plea to a quo warranto stated that a court leet was, in part, holden in the morning and in part in the evening; and that the usage had been to elect a burgess to be mayor at the morning court; and it was proved, in addition, that a jury of the leet used to present the person elected to be sworn in by the steward at the evening court, which burgess had been accustomed to be sworn into the office of mayor, at such evening court, by the steward or his deputy; and the only objection there taken was, that the latter usage ought to have been stated in pleading, as a necessary part of the custom. In *Rex v. Joliffe (b)*, a similar custom, as to the nomination of jurors, was stated, and no objection taken. There is no reason why the king should not grant to the court leet for the manor and borough, authority to

(a) 3 B. & A. 130.

(b) 2 B. & C. 54.

present persons to be admitted burgesses of the borough, nor why such persons should not be admitted: and, if such a grant would be good, a custom which may be presumed to have originated in such a grant may be equally so.

1893.

The King
against
The Duke of
BRAUFORT.

Ludlow Serjt. and *Whitcombe* contra. The single question is, whether the custom stated in the mandamus be good; and the Court ought to see affirmatively on the face of the record that it is so. *Rex v. Bird* (a) shews that a bye law is void which purports to give a voice in the election to any person who does not possess it under the custom or charter, as if it be given to the recorder when not a corporate officer, but merely a legal adviser: and Lord *Ellenborough* there says, "He may be a stranger to the corporation, and therefore there could be no delegation of the elective power to him." It is clear that the leet jury may consist of strangers: in *Comyn's Digest*, tit. *Leet*, G. 1. it is stated, "that if there be not twelve present in the leet a stranger may be sworn on the inquest, and the steward may compel a stranger travelling within the leet to be sworn." Besides, the prosecutor's plea negatives the custom stated in the return, which would limit the power of the leet to the appointment of persons falling within the three specified classes. In order, therefore, to support, in point of law, the custom relied on by the crown, it must be maintained that a body of strangers to a corporation may possess the right of compelling the admission into it of any persons they may think fit to select, though

(a) 13 *East*, 384.

1839. such persons also may be wholly unconnected with the corporation.

The King
against
The Duke of
BRADFORD.

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. After stating the custom set out in the mandamus, and the return and traverse, his lordship proceeded as follows:—The case was tried before my brother *Alderson* at the assizes for the county of *Glamorgan*, and a verdict found for the crown. A motion was afterwards made in arrest of judgment, upon the ground that the custom stated on the record was bad, inasmuch as the effect of it was to constitute the leet jury of the borough and manor of *Loughor* electors of the freemen for that borough, which jury may possibly consist of persons none of whom are corporators, nor even inhabitants within the borough. It does not appear upon the pleadings whether the borough and manor are co-extensive, but it does appear that one leet jury serves for both; and we must presume that such jury is properly and legally constituted. We have examined the authorities which bear upon this subject, none of which are directly in point, and which need not therefore be cited; and we are of opinion, that there is nothing unreasonable or illegal in a custom which gives to the leet jury of the borough (although it be also the jury of the manor) the right of electing the members of the corporation, in whom the government of that borough is vested.

The existence of the custom has been found by the verdict, and therefore judgment must be entered for the crown.

Judgment for the crown.

1833.

COTTLE *against* WARRINGTON, Clerk.Wednesday,
June 12th.

IN *Michaelmas* term 1832, *W. H. Watson*, on behalf of Messrs. *Meggison*, *Pringle*, and *Manisty*, creditors of the above-named defendant, obtained a rule calling on the plaintiff, on one *Charles Metcalfe*, and on the Archbishop of *York*, to shew cause as follows; viz.

Why the said Archbishop should not forthwith suspend the several sequestrations by him granted at the suit of the plaintiff, and now remaining unsatisfied, so far as the same relate to or affect the vicarage and parish church of *Leeke*, in the North Riding of the county of *York*; and why he should not make a return to the writ or writs under which the said plaintiff (or *Charles Metcalfe* of, &c., in the name of the plaintiff,) has received the profits of the said vicarage since the 10th of *August* last, and shew what has been levied thereon; and why the amount so levied should not be paid over by the said *C. Metcalfe* to the said *M., P., and M.*; and why the said archbishop should not forthwith execute a writ of sequestrari facias issued at the suit of the said *M., P., and M.*, and levy the debt and damages in the said writ mentioned, out of the growing profits of the said vicarage; and why it should not be referred to the Master of this Court to ascertain what sums of money the said *C. Metcalfe* hath from time to time

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of *Yorkshire*, to secure payment of an annuity, need not be registered under 8 G. 2. c. 6.; for though it may be enforced by sequestration, the benefice is not affected by the judgment.

The judgment was for 1800*l.* The warrant of attorney provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a sequestrari facias thereupon, it appeared that at that time the former creditor

had by sequestrations levied more than 1800*l.* for arrears of his annuity, and there were arrears still due. The Court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l.*, levied before the signing of his judgment.

1893.

COTTE
against
WARRINGTON.

levied and received under and by virtue of writs of execution or sequestration from time to time issued in pursuance of a judgment obtained by the plaintiff *James Cottle* against the defendant upon a warrant of attorney dated the 9th of *August* 1811; and why, if the master shall find that he hath levied or received more than 1800*L.*, he should not refund the surplus, and pay to the said *M., P., and M.*, so much thereof as may be necessary to satisfy their said debt and damages (the said defendant consenting thereto), and pay the residue, if any, to the defendant; and why the said *C. Metcalfe* should not cause satisfaction to be entered upon the roll of the judgment so obtained by the plaintiff against the said defendant, and why he should not pay the costs of this application.

It appeared that the defendant, by indenture of the 9th of *August* 1811, in consideration of 900*L.*, granted to the plaintiff an annuity of 150*L.*, payable as therein mentioned, and charged upon the vicarage of *St. Lawrence Jewry, London*, for ninety years, if the defendant should so long live; and covenanted that, if he should exchange that vicarage for any other living, he would charge the latter with the annuity. He also executed a warrant of attorney, of the above date, to suffer judgment in an action of debt for 1800*L.* at the plaintiff's suit; with a memorandum or defeazance, stating that the said warrant of attorney was given for securing to the plaintiff, his executors, &c. an annuity of 150*L.* for the defendant's life, by equal quarterly payments on, &c., as mentioned in an indenture of the same date, between, &c.; and it was thereby agreed, that no execution should issue upon such judgment unless and until some quarterly payment of the said annuity should be

be in arrear thirty days, and then and in every such case it should be lawful for the said plaintiff, his executors, &c., from time to time to sue out execution for the recovery of the arrears of the said annuity and every part thereof, and all costs and charges attending the non-payment thereof (a): and it was thereby also agreed that from and after the decease of the defendant, and full payment of the arrears and costs, the plaintiff, his executors, &c. should, on the request and at the cost of the defendant's heirs, executors, &c. acknowledge satisfaction of the said judgment on the record. The plaintiff sold the annuity for 800*l.* to *Metcalfe*, who, in *February* 1814, sequestered the vicarage of *St. Lawrence Jewry* by virtue of a judgment entered up in the plaintiff's name on the warrant of attorney. In *November* following the defendant exchanged that vicarage for the vicarage of *Leeke*, which, in the ensuing *May*, was sequestered for payment of the annuity, and continued under sequestration, on the same account, down to the present time. In *November* 1818 the defendant, at *Metcalfe's* request, executed a deed, charging the annuity on his vicarage of *Leeke*, by way of substitution for the vicarage of *St. Lawrence Jewry*, making such annuity payable to *Metcalfe*, his executors, &c., and covenanting with him for the payment thereof. A memorial of this indenture was registered in the North Riding of *Yorkshire*, pursuant to 8 G. 2. c. 6., in the same month of *November*. The said *Metcalfe*, by virtue of the judgment entered up in the name of the plaintiff, issued from time to time divers writs of sequestrari facias; and the defendant, in his affidavit,

1833.

 COTTE
 against
 WARRINGTON.
(a) See *Colebrook v. Layton*, 4 B. & Ad. 578.

stated

1833.

COTTE
against

WARRINGTON.

stated his belief that the amount levied under such writs exceeded 1800*l.*, and that the judgment had been long ago satisfied.

The defendant was also indebted to Messrs. *Meggison*, *Pringle*, and *Manisty*, as his attornies, in the sum of 500*l.* for business done, and advances; to secure which he gave them a warrant of attorney, dated *August* 9th, 1832, to suffer judgment for 500*l.* and costs. Judgment was entered up thereon by *Meggison*, *Pringle*, and *Manisty*, on the 10th of *August* 1832, and a memorial of such judgment registered in the registry for the North Riding, pursuant to the statute. They afterwards issued a *fi. fa.* upon the judgment, directed to the sheriffs of *London*, who returned *nulla bona*, and certified that the defendant was a beneficed clerk, &c. *M.*, *P.*, and *M.* then sued out a writ of *sequestrari facias* directed to the Archbishop of *York*, commanding him to sequester the vicarage of *Leeke*, and hold the same till he should have levied their debt and damages out of the profits. At the time of the present application the last-mentioned writ remained in the Archbishop's hands, ready to be executed so soon as the writ or writs of *sequestrari facias* issued in the name of the plaintiff, at *Metcalf's* instance, should be satisfied, or the sequestrations issued thereon should be relaxed. There was no judgment against the defendant registered in the North Riding, except that obtained by Messrs. *Meggison*, *Pringle*, and *Manisty*.

Metcalf, in his affidavit in opposition to the rule, stated that he had caused several writs of sequestration to be issued on the judgment obtained by him, and sequestrations to be granted thereon, for levying the arrears of annuity upon

upon the vicarage of *Leeke*, but only such arrears (with costs) as from time to time had become and were due at the time of issuing such sequestrations, and not for levying the penalty of 1800*l.* in the warrant of attorney and judgment mentioned; and that a large amount still remained due to him in respect of the sums directed to be levied under the said writs of sequestrari facias, and sequestrations; and that he claimed to retain the rents and profits received by him, towards payment and satisfaction of the said several arrears, and to collect such rents and profits until his demands should be fully satisfied. *Metcalf* also suggested that the exchange of *St. Lawrence Jewry* for *Leeke*, was made for the purpose of defeating the sequestration on the former vicarage.

1833.

 COTTE
 against
 WARRINGTON.

Kelly, in *Easter* term last, shewed cause. The first ground laid for this application is, that the judgment entered up in the name of the plaintiff, not being registered, is fraudulent and void as against the registered judgment of *Meggison*, *Pringle*, and *Manisty*, by the provision of 8 G. 2. c. 6. s. 1.; and, consequently, that the writs ought to be set aside. But the case is not within that statute. The statute was intended to prevent the secret conveyance or incumbering of lands; and it requires the registration of all deeds and conveyances, judgments, &c. whereby any lands, tenements, or hereditaments may be any way affected in law or equity. The proceeding upon this judgment begins with a *fi. fa.*, to which the sheriff returns, that the defendant is a beneficed clerk, having no goods in the bailiwick upon which a levy can be made, and then the writ issues for sequestering the ecclesiastical goods. It
 cannot

1893.

—
 COTTE
 against
 WARRINGTON.

cannot be said that this judgment "affects the lands" within the meaning of the statute. As to the other point, that *Metcalfé* has received more than 1800*l.*, and that nothing beyond that sum ought to have been levied, it may be proper, in the first instance, that the Master should ascertain what has in fact been received.

W. H. Watson contra. The words of 8 G. 2. c. 6. s. 1. extend to all "honours, manors, lands, tenements, and hereditaments," and require a memorial to be registered of all deeds, conveyances, judgments, statutes, and recognizances, "of or concerning, or whereby" such lands, &c. "may be any way affected in law or equity." [*Parke J.* Suppose there are two judgments, and the party who has obtained the later judgment first sues out execution. Which execution would have the priority?] The first sued out. [*Parke J.* Then the judgment does not affect the lands. *Little-dale J.* How can it be said that a judgment affects the glebe of a vicarage?] The fieri facias de bonis ecclesiasticis issues on a judgment; on that writ a sequestration issues, whereby the profits of the land may be taken in the same manner as the profits of the land were taken at common law, by a writ of levari facias (*a*). It is difficult to say how the land can be more immediately affected. [*Parke J.* To come within the meaning of the statute, the judgment ought to bind the lands. Here that was not the case. Nor was the living affected, in the sense of the act, by the judgment.] The words in the statute, "in any way affected in law or in equity," were meant to have an operation beyond

(a) *Arbuckle v. Cowtan*, 3 Bos. & Pul. 421.

the word "*bound*." If the land was not immediately, it was mediately, affected by the judgment.

1833.

—
COTTE
against
WARRINGTON

The Court (a), however, being of opinion, that the judgment did not need registration, referred it to the Master to ascertain what had been levied under the writs sued out by *Metcalf*.

The Master now reported that *Metcalf*, down to *August 10th, 1832*, had levied 239*9*l.; and *Watson* moved that the report should be confirmed, and that so much of his rule as was not already disposed of by the proceedings which had taken place, should be made absolute.

Kelly shewed cause. By the terms of the defeazance of the warrant of attorney, the plaintiff was to be at liberty from time to time to levy the arrears of the annuity. The judgment was, therefore, a mere security, by virtue of which the arrears might be levied. When the arrears had been levied, then the judgment, by the agreement of the parties, might be put in force for future arrears. The judgment has only been enforced for levying the arrears. [*Parke J.* The judgment may be a security; but you cannot levy in all above the amount. If the arrears, at one time, had amounted to 2000*l.*, it is clear you could not have levied above the penal sum.] This is not like an ordinary judgment. By the defeazance to the warrant of attorney it is agreed that no execution shall issue till some quarterly payment be in arrear thirty days; and in every such case it shall

(a) *Denman C. J., Littledale, and Parke Js.*

1833.

—
COTTE
against
WARRINGTON.

be lawful for the plaintiff from time to time to sue out execution for the arrears: and satisfaction is only to be entered up in the particular event stated. At any rate the Court cannot be asked to order that *Metcalf* should pay back what he has received to the parties making this application, for there are large arrears of the annuity. This is an application to the equity of the Court. [*Littledale J.* How can it be said that this is an application merely to the equity of the Court? Suppose an action had been brought upon the judgment, and payment pleaded, the plaintiff could not have recovered more than the penal sum. After the whole penal sum had been levied, the parties might be trespassers for levying on another sequestration. *Parke J.* On suggestion of breaches under the statute of 8 & 9 W. 3. c. 11. the plaintiff might have a sci. fa. from time to time for subsequent breaches and execution; but in all he could not recover or have execution on the judgment beyond the penalty.] To order the surplus to be paid to the present applicants would debar *Metcalf* from his equity on that fund against the defendant, to which fund Messrs. *M.*, *P.*, and *M.*, have no right.

W. H. Watson, in support of the rule, contended, that the surplus levied ought to go in discharge of the debt due to Messrs. *Meggison*, *Pringle*, and *Manisty*, as the defendant was entitled to it, and had assented (by the rule of Court) to the surplus being paid over.

Per Curiam (a). These parties cannot be placed in a better situation than if an application had been made by

(a) *Denman C. J.*, *Littledale*, *Parke*, and *Patterson J.*

them

them immediately on obtaining their judgment, to enter up satisfaction on the record. The rule will be, that satisfaction be entered on the judgment roll as of and up to the 10th of *August* 1832; and that the Archbishop of *York* pay over to Messrs. *Meggison, Pringle, and Manisty*, all sums levied on the vicarage in question since that day, towards satisfaction of their judgment, giving priority therein to their writ.

Rule absolute accordingly.

1833.

—
COTTE
against
WARRINGTON.

SIGGERS *against* BRETT, Clerk.

Wednesday,
June 12th.

THE defendant, being a prisoner within the rules of the King's Bench prison, applied to be discharged as supersedeable, pursuant to section 88. of the first general rule of *Hil. T. 2 W. 4.* (a) The plaintiff objected, on the ground that the defendant had agreed not to supersede the action; to which it was answered, that no notice of that agreement had been given to the marshal, as required by the same general rules, section 87. Cause was shewn against the discharge, upon summons before *Patteson J.*, at chambers; and the learned Judge there decided that the question of notice was immaterial, inasmuch as the 88th rule only applied to prisoners within the walls; but he left it to the defendant to move this Court if he should be so advised. A rule was accordingly obtained, calling on the plaintiff to shew cause why the defendant should not forthwith

Sections 87, 88., of the first general rule of *Hilary* term 2 *W. 4.*, relating to the discharge of prisoners in the custody of the marshal of the King's Bench and warden of the Fleet, who are supersedeable, apply only to persons within the walls of the respective prisons.

(a) 3 *B. & Ad.* 387.

1833.

Secura
against
Barr.

be discharged out of the custody of the marshal as to this action, being supersedeable therein.

R. V. Richards now shewed cause. The rule only applies to prisoners in the "actual custody" of the marshal. Those are the words used in the rule, sect. 87., which applies to all the cases contemplated in the 88th; and actual custody must mean imprisonment within the walls, as distinguished from confinement with benefit of the rules. The mischief which this rule of Court was intended to counteract, was, that persons voluntarily remained within the walls of the prison, when there was no real cause for their detention (a).

Channell contra. The construction which is contended for attaches too much importance to the word "actual." A person within the rules is in custody; he is under restraint, and his going out without proper sanction would be an escape as much as if he were within the walls. The alleged purpose of the rules, viz. to keep the gaols clear, does not appear from the rules themselves. [*Patteson* J. I was of opinion that the eighty-seventh section of the late rules of court, was only a repetition of the rule of *Mich. T. 57. G. 3. (b)*,

(a) The affidavit of the plaintiff's attorney stated his information and belief that, before the making of the rules of Court on this subject, it was the practice of many persons to cause themselves to be arrested and committed to the prisons of the King's Bench and the Fleet for the purpose of keeping shops therein, and to enable them to hold lucrative appointments in the said prisons, such as cook, kitchen-keeper, racket-master, nine-pin-master, and others; and that the said rules were made to enable the marshal and warden to discharge any person who might be in such voluntary confinement.

(b) 5 M. & S. 522.

introduced

introduced for the purpose of extending that rule to the Courts of Common Pleas and Exchequer. And the rule of 57 G. 3. was intended only to remedy an inconvenience arising under the rule of *Trin. T. 56. G. 3.*, there referred to (a). Now, the early part of this last mentioned rule (of which only the last clause is given in the books of practice) refers wholly to persons

1833.

Scotias
against
Barry.

(a) The rule (which is only in part recited in 5 M. & S. 522.) is as follows:—

Trin. T. 56 G. 3. Whereas by a rule of this Court made in *Trinity* term in the twenty-first year of his present Majesty's reign, it was ordered that the marshal of the marshalsea of this Court do not suffer the wives or children of any of the prisoners to lodge in the prison under any pretence whatsoever; and whereas, notwithstanding the above order of this Court, a practice has prevailed for the wives and children of the prisoners to lodge in the prison, even without special leave or permission given them by the marshal for that purpose; and whereas it is expedient that the due execution of that rule should be revived and strictly enforced, except for some special cause, to be judged of and allowed by the marshal, and afterwards notified to the Judges of this Court; it is therefore hereby ordered by this Court, that no persons, except the prisoners, lodge or continue during the night in the prison, unless by the permission of the marshal for special cause, which shall be presently written in a book and signed by him, and laid before the Judges of this Court in their chamber at *Westminster Hall*, within the first four days of the term next ensuing, for which permission no fee or gratuity shall be taken by any person whatsoever; and it is further ordered, that the marshal do keep a book, wherein shall be regularly entered from time to time the number of persons sleeping in each room, which book shall be in like manner laid before the Judges of this Court within the first four days of each term; and it is further ordered, that the marshal take care that the prison doors be shut and locked for the night, at nine of the clock every evening, except in term time, and then at ten of the clock, and that the coffee-room and tap-room be shut and locked at ten of the clock every night, except in term time, when the same may continue open until half-past ten. And it is further ordered, that the marshal present to the Judges of this Court in their chamber at *Westminster Hall*, within the first four days of every term, a list of all such persons as are supersedeable, shewing as to what actions, and on what account, they are so, and as to what actions (if any) they still remain not supersedeable.

1833.

SIGGERS
against
BARTT.

within the walls; it would seem, therefore, that the concluding part was meant to have the same application.]

DENMAN C. J. I think, upon comparison of the rules of Court, that the regulation in question applies to persons within the walls; and it appears to me that the words "actual custody" must have that sense.

LITTLEDALE J. concurred.

PARKE J. It appears clearly, from the several rules, that the occasion of making them was to prevent the prisons being too full.

PATTERSON J. I am of the same opinion; and a learned Judge (*Bayley J.*), who was on the bench of this Court when the rule of *Trin. T. 56 G. 3.* was made, told me the reason of it was, that the Court constantly found the King's Bench Prison full of persons who were supersedeable, and would not go out.

Rule discharged.

Wednesday,
June 12th.

TESSIMOND *against* YARDLEY.

The act 1 W. 4. c. 21. "to improve the proceedings in prohibition," does not enable this Court, where a party has declared in Ecclesiastical Court.

THE plaintiff, a churchwarden, commenced proceedings against the defendant in the Consistory Court of *Lichfield*, for the recovery of church rates. A question of boundary being raised by the defendant, the plaintiff and succeeded, to grant him his costs incurred in the Eccle-

plaintiff

plaintiff afterwards obtained a rule of this Court calling on him (the plaintiff) to declare in prohibition; which he did, and obtained a verdict. The Master, in taxing the costs, disallowed those incurred in the Ecclesiastical Court before the prohibition, and a rule nisi was thereupon obtained for reviewing the taxation.

1853.

—
 TESTIMONY
 against
 YARDLEY.

F. Robinson now shewed cause. The motion must be grounded on 1 *W. 4. c. 21. s. 1.*; and that only provides that "the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings." The preamble, indeed, states that "it is expedient to make some better provision for payment of costs in cases of prohibition;" but that does not necessarily apply to the present case: there were other instances in which the former law had been found defective in this respect, and to which the new enactment is applicable. *Scammell v. Wilkinson (a)*, *Pentress v. Harvey (b)*, *Brymer v. Atkyns (c)*.

R. V. Richards contra. If the Master cannot tax these costs, then, whenever the Court grants a prohibition, the successful party is left without remedy for the costs below. [*Parke J.* Could not the Ecclesiastical Court grant the costs? They had jurisdiction of the matter in the first instance, though not of the question raised in defence to the action.] They have no power (*d*). An analogy may be drawn here from the practice in replevin, where the costs below are taxed (*e*). [*Little-*

(a) 3 *East*, 202.(b) 1 *B. & Ad.* 154.(c) 2 *Tidd*, 349. 9th ed.(d) See *Crompton v. Waterford, Halley*, 167.(e) See *Davies v. James*, 1 *T. R.* 371.

1833.

TESTIMONY
against
YARDLEY.

dale J. There the proceeding above is a continuation of the original suit.] The practice before the late act is stated in *Haughton v. Starkie (a)*; but the act must be taken to have corrected it in all respects, and to extend to the present case.

Per Curiam. The words of the act are express. It may be hard on the defendant not to obtain these costs, but there are many cases to which the same observation would apply, where costs cannot be recovered.

Rule discharged.

(a) 1 *Stra.* 82.

Wednesday,
June 12th.

HILLARY against ROWLES and Two Others.

The Uniformity of Process Act, 2 *W. 4. c. 59.* Sched. No. 4. repeals sect. 24. of the first General Rule of *Hilary* term 2 *W. 4.* : and, therefore, if a party held to bail on a *capias* do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail bond in suit.

ON the 7th of *May* the defendant *Rowles* was arrested at the suit of the plaintiff, and executed a bail bond, with the two other defendants as his bail. On the 15th, *Rowles* not having put in bail above, the plaintiff took an assignment of the bail bond, and issued writs of summons against all the parties. *Platt*, in this term, obtained a rule to shew cause why the proceedings on the bail bond given in the original action should not be set aside for irregularity; on the ground, principally, that the bail bond had been put in suit too soon, inasmuch as the first rule of Court, *Hilary* term, 2 *W. 4. s. 24. (a)*, directs that no bail bond taken in *London* or *Middlesex* shall be put in suit until after the expiration of four days exclusive from the appearance day of the process.

(a) 3 *B. & Ad.* 377.

Archbold

Archbold now shewed cause. The rule is now altered by the Uniformity of process act, 2 *W. 4. c. 39.*, for the Schedule to that act, No. 4., gives the form of the writ of *capias*, in which the defendant is required to take notice "that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him, in our court of ———, to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written." And the warning, sect. 3. states, that "If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail bond." Before the act of 2 *W. 4.*, a defendant arrested in *London* or *Middlesex* had four days exclusive, from the return of the process, to put in special bail; and the rules of *Hilary* term, 2 *W. 4.* gave four days exclusive, from the appearance day, before the bail bond could be put in suit. Now, the defendant has eight days after execution of the process, including the day of execution, to put in his bail, but after the expiration of that period no further time is given: so that, the arrest here being on the 7th, the proceedings were properly commenced on the 15th. The same point has lately been determined in the Court of Exchequer, *Alston v. Undershill.* (a)

Platt contra. The rule of *Hilary* term, 2 *W. 4.* expressly forbids proceeding on the bail bond till after the expiration of four days from the appearance day, and the warning referred to only says in general terms, that

(a) 3 *Tyr.* 427. 1 *Cro. & M.* 492. And see *Thompson v. Dicus*, 4 *Tyr.* 875.

1833.

 HILLANT
 against
 ROWLES.

1833.

HILLARY
against
BOWLER.

if bail be not put in as required, the plaintiff "may proceed" against the sheriff. That does not amount to a repeal of the rule. [*Littledale J.* The form of the capias expressly points out the time after which the plaintiff may proceed.]

The Court held that the action was rightly commenced; but on a statement of merits on the defendants' part, they allowed the proceedings to be set aside on terms.

Wednesday
June 12th.

THOMAS, Gent. against SAUNDERS and
Another, Esquires.

The 7 & 8 G. 4. c. 30. s. 41., which directs that actions brought for any thing done in pursuance of that statute shall be tried in the county where the fact was committed, applies only to the case of parties exercising particular powers conferred by the statute.

In an action against justices for falsely imprisoning the plaintiff on a charge of feloniously beginning to demolish a house, contrary to the act, the Court granted a rule to change the venue, on a suggestion that a fair trial could not be had in the county.

A RULE had been obtained, calling on the defendants to shew cause why a suggestion should not be entered on the roll for the purpose of changing the venue, on the ground of prejudice in the county where it was at present laid. The plaintiff had been committed to prison by a warrant under the hands and seals of the defendants, justices of the county of the borough of *Carmarthen*, for riot and feloniously beginning to demolish a dwelling-house, contrary to the statute 7 & 8 G. 4. c. 30. s. 8., and for that committal he brought his action of false imprisonment against them.

Sir *James Scarlett* now shewed cause, and relied on sect. 41. of the act, which provides, "that all actions and prosecutions to be commenced against any person

for

for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed."

1833.

THOMAS
against
SAUNDERS.

John Evans contra. The matter complained of here is not a thing done in pursuance of the act within the meaning of the clause. That relates to the exercise of peculiar powers given by this act, as in the case of summary convictions. Here the defendants were not acting on any such powers, but in the course of the common law. The more general clause, 21 *Ja.* 1. c. 12. s. 5., to which this corresponds, was passed for the purpose of making certain actions local which would otherwise have been transitory, but does not prevent the Court from removing the trial of a cause, by suggestion, from a county where it could not be fairly tried. [*Parke J.* The 7 & 8 G. 4. c. 30. s. 41. applies to cases where the thing is done by colour of the act; where it could not have taken place if the defendants had not been armed with powers which the statute gives. When the parties are acting on the jurisdiction so conferred, the limitation operates, but not when they are proceeding upon a common law authority.]

The Court made the rule absolute for changing the venue to the county of *Brecon*.

1833.

POPE *against* LANGWORTHY.

Where certain roads were, by local acts, placed under the direction of trustees for amending, improving, and repairing the same, and the trustees were empowered to erect turnpike gates on the said roads, and receive tolls there; but there was a certain portion of one of the said roads, which they were prohibited from repairing or improving, and on which they were not to erect toll gates:

Held, that a person travelling along the last-mentioned road for more than a hundred yards, including the excepted part, but less if that part were excluded, was not exempted from toll by 3 G. 4. c. 126. s. 32.

ASSUMPSIT for tolls by the plaintiff as farmer, renter, and collector of the tolls upon a turnpike-road in the county of *Somerset*. Plea, the general issue. At the trial before *Alderson J.*, at the *Somersetshire* Summer assizes 1831, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

By a local act, 10 G. 4. c. xciii., intituled, “An Act for more effectually repairing and improving several Roads which lead to and through the Town and Borough of *Chard* in the County of *Somerset*,” it was enacted, that the statute should be put in execution for the purpose, amongst others, “of amending, altering, diverting, turning, widening, improving, and keeping in repair,” several roads, of which the roads in question are part. The trustees were empowered to erect turnpikes, toll-gates, &c. upon, across, or near the side or sides “of the roads thereinbefore described, or any of them,” and to receive there certain tolls. All monies arising from the tolls were directed to be applied, after payment of certain incidental expenses and debts, interest due on mortgages, &c., and expenses of building toll-houses, &c., in defraying the expenses of making or diverting, altering, raising, widening, improving, repairing, and preserving the said roads, and, lastly, in paying off the debts. The trustees were prohibited from applying any of the tolls “in or towards the repairing, lighting, or improving any of the streets, highways, or places within

within the said town and borough of *Chard*." By virtue of this act the trustees erected a turnpike-gate, called the east gate, at the eastern entrance of *Chard*, upon the road after mentioned, leading from *Crewkerne* to and through *Chard* towards *Ilminster*, at which gate the plaintiff was the collector.

An act of the 11 G. 4. repealed the clause of 10 G. 4., which enacted, that the trustees should not apply the tolls, towards repairing, &c. any of the streets, &c. within the town and borough of *Chard*, but provided that none of the tolls should be laid out and expended in the repair and improvement of certain streets in *Chard*, therein particularly described, and, among others, the principal street, extending from the *School-house Porch* to a dwelling-house in this act described, at the west end of the town; and it forbade the erecting of any toll-gate within those limits.

The *Ilminster* turnpike road (described in the local act of 9 G. 4., under which it is maintained, as "The turnpike road from the east end of the town of *Chard* through *Ilminster*,") joins the *Crewkerne* turnpike road above mentioned at a place called the *School-house Garden*, at the entrance of *Chard*, the said *Crewkerne* road passing through the east gate, and through the town of *Chard*, to the said point of junction.

The defendant passed in a carriage on the *Crewkerne* road through the east gate, and thence to the *Chard Arms* hotel in the town of *Chard*, and, on the following day, returned in the same manner, on each occasion refusing to pay the toll of 6d. which was demanded of him. From the east gate to the point where the *Ilminster* road joins the *Crewkerne* road, the distance, travelled by the defendant, is forty yards; from the east
gate

1838.

POPE
against
LANGWORTHY.

1893.

For
against
LANGWORTHY.

gate to a place called the *School-house Porch*, between the gate and the hotel, is less than a hundred yards; but the whole distance so travelled by the defendant to the *Chard Arms* hotel is several hundred yards. The road from the *School-house Porch* to the hotel is a part of the road which the trustees are restrained from repairing or improving. Before the passing of the 10 G. 4. the trustees repaired the whole road, including the part from the hotel to the *School-house Porch*, and, ever since that period, they have exercised control over the part which they are restrained from repairing, by preventing nuisances upon it.

The question for the opinion of the Court was, whether under s. 32. of the general turnpike act (3 G. 4. c. 126.), which exempts all horses, carriages, &c., "which shall only cross any turnpike-road, or shall not pass above 100 yards thereon," the defendant was exempted from the payment of toll at the eastern gate of *Chard*.

This case was argued in the present term by *Follett* for the plaintiff, and *Erle* for the defendant, who endeavoured to distinguish the case from *Bussey v. Storey* (a), on the ground, that the trustees here were expressly prohibited from laying out their funds in improving the portion of road in question, from the *School-house Porch* to the *Chard Arms* hotel, as well as from taking tolls on it. But

The Court (b) held that the two cases were not distinguishable.

Postea to the plaintiff.

(a) 4 B. & Ad. 98.

(b) *Denman C. J., Littledale, Parke, and Patteson Js.*

1888.

REGULÆ GENERALES (a).

IT IS ORDERED, That in all cases in which a Defendant shall have been, or shall be detained in prison on any writ of *capias* or detainer, or being arrested thereon shall go to prison for want of bail, and in all cases in which he shall have been, or shall be, rendered to prison before declaration, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, *or render and notice thereof*, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the statute 2 W. 4. c. 39., Schedule No. 2., unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge.

(Signed by all the Judges.)

IT IS ORDERED, That, from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the sheriff, the Defendants shall plead to the declaration at the same time, in the same manner, and under the same rules as in actions against defendants who are not in custody.

(Signed by all the Judges.)

(a) These rules were read in Court on the 24th day of May.

C A S E S

1833.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fourth Year of the Reign of WILLIAM IV.

MEMORANDUM.

In *Trinity* vacation, *John Balguy*, of the *Middle Temple*, Esq., was appointed one of His Majesty's counsel, and took his seat within the bar on the first day of this term.

REGULA GENERALIS.

IT IS ORDERED, that from and after the 10th day of *July* next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at *Westminster*, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

Signed by all the Judges on the 17th of *June* 1833.

1833.

The KING *against* The Inhabitants of LEAKE.

INDICTMENT for the non-repair of a road lying on the east side of *Hobhole Drain*, in the parish of *Leake*, in the county of *Lincoln*, beginning at a certain bridge called or known by the name of *Simon's House Bridge*, situate in the parish of *Leake*, and continuing from thence in a northwardly direction towards and unto a certain other bridge, situate at *Lade Bank*, in the county aforesaid, containing in length 1160 yards, and in breadth eleven yards. At the trial before *Tindal C. J.*, at the *Lincoln* Summer assizes, 1831, a verdict of guilty was entered, subject to the opinion of this Court on the following case: —

By an act, 41 G. 3. c. 135., for the more effectually draining certain tracts of land called *Wildmore Fen*, and *West* and *East Fens*, and other lands in the county of *Lincoln*, certain commissioners were appointed for the purpose of such drainage, and by section 11. they were authorised to make the drains and other works therein

The inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.

Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them.

By an act for draining fen lands, commissioners were authorised to make drains and

other works therein prescribed, and also to make a new cut or main drain as therein mentioned, and to dispose of all earth and soil arising from the drains directed to be made, in forming banks, at certain distances, on each side thereof; and the banks, drains, &c. were to remain under their control, for the purposes of the act. The commissioners, under the powers of the act, made a drain according to the act, and with the earth taken from it made a bank on one side of it, of the average breadth of forty feet: this drain and bank were never part of the fen, but were old inclosed land, and bounded by old inclosures on both sides; and the land upon which they were respectively made, was purchased by the commissioners for the purposes of the act. The bank had been used for about twenty-five years as a public highway, and was a convenient and useful road for the public.

Upon a special case, stating these facts, it was held by *Denman C. J.* and *Parke J.*, *Littledale J.* dissentiente, that the dedication of this part of the bank as a road to the use of the public was not inconsistent with the purposes to which the commissioners were bound by the act to apply it; it not appearing by the case, (which, however, ought to have been more express on these points; per *Parke J.*) that the cleansing of the drains or any other purpose of the act had been or was likely to be interfered with by such user of the soil.

prescribed;

1833.

—
The King
against
The Inhabit-
ants of
LEAKE.

prescribed; and, among other things, they were authorised and required to make a new cut or main drain from *Hobhole Gwot*, in the river *Witham*, in a northward direction to a place called *Bennington Bridge*, and thence in continuation to a place called *Simon's House Bridge*, and from thence across the *Lade Bank*, and thence to the lands of *Toynton St. Peter's*, which said main drain at *Bennington Bridge* was to be made of a certain width and slope described in the act. And they were, by section 12., further authorised and required to dispose of all the earth and soil arising from the several cuts and drains therein before directed to be made, in forming banks on each side thereof respectively, at least six feet distant, at an average, from the verge of the slopes or batters: and they were to make, erect, alter, &c. such other cuts, drains, and banks as they should think necessary in the *East Fen*, &c. And by section 14. it was further enacted, that the several cuts, drains, banks, &c. and other works thereinbefore directed to be executed by the said special commissioners, should be executed under the direction and control, and to the satisfaction of certain commissioners in the said act mentioned, called general commissioners; and should, from and after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject and liable to the power, jurisdiction, and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done, and executed under the authority of an act therein recited, passed in the second year of *George III.*, for draining and preserving certain lands therein mentioned, and other purposes; by which said act of the second of *George III.* the said general commis-

commissioners had the same powers of purchasing lands, or making compensation, for the purposes of such drainage, as are contained in the act of 41 G. 3. c. 135.; which lands, when so purchased, were to be conveyed to the said general commissioners, and entirely divested from the vendors (as in this act of 41 G. 3.) and vested in the said commissioners for the purposes of that act of the second year of *George III.* And by the 41 G. 3. c. 135. it was further enacted, (s. 19.) that the said special commissioners should have full power and authority to agree with the proprietors of, and persons interested in, any lands or tenements which the said commissioners should judge necessary or expedient to be cut, dug, or otherwise made use of for the purposes of the act, for the purchase of the same, or for allowing compensation for any injury that might be done thereto: and that, in case of purchase, all such contracts, agreements, sales, conveyances, &c. should be valid and effectual in law to all intents and purposes whatsoever, to convey all estate and interest of the person conveying, and all right, title, estate, interest, trust, or claim of any person whatsoever to the said commissioners.

The commissioners under the above act forthwith made a drain, called *Hobhole Drain*, as directed by the act, in a straight line from *Hobhole* in the river *Witham* to *Toynton St. Peter's*. The length of this drain from *Hobhole* to *Bennington Bridge* is about six miles; from *Bennington Bridge* to *Simon's House Bridge* about 814 yards; from *Simon's House Bridge* to *Lade Bank* 1160 yards; and from *Lade Bank* to its termination in the lands in *Toynton St. Peter's*, about four miles. The commissioners made a bank on the east side of the drain, with the earth taken from it, in the manner directed

1833.

The King
against
The Inhabit-
ants of
LEAKE.

1833.

—
The King
against
The Inhabit-
ants of
Leake.

directed by the act, and of the average breadth of forty feet. The drain and bank from *Bennington Bridge* northward to *Lade Bank* was never part of the fen, but was old inclosed land, and is bounded by old inclosures on both sides; and the land upon which the drain and bank are respectively made was purchased by the commissioners for the purposes of the act. The said bank has been used by all persons for about twenty-five years as a public highway for horses, carts, and carriages, without intermission, and is a very convenient and useful road for the public. About two miles of this road, commencing at *Bennington Bridge*, and extending northwards towards *Toynton St. Peter's*, are in the parish of *Leake*. The part indicted is that part of these two miles (in length 1160 yards) between *Simon's House Bridge* and *Lade Bank*. It is in the parish of *Leake*, and out of repair as charged in the indictment. There is a road, joining the road in question, leading from *Simon's House Bridge* to *Leake* town.

By virtue of another act of parliament, passed in 1807, certain commissioners for draining the east and west fens, set out, and, in *September* 1820, awarded, a public carriage road of the width of fifty feet, beginning at *Lade Bank* at the northern termination of the part of the road now indicted, and forming a continuous and straight line therewith, and proceeding along the said east bank to the northernmost extremity thereof, where it joins another public highway.

The parish of *Leake* has always repaired the part of the said road on the east bank from *Bennington Bridge* to *Simon's House Bridge*, and from *Lade Bank* northward as far as the parish of *Leake* extends; and it was proved that about ten years ago that parish repaired the part of the road now indicted.

If

If the Court should be of opinion that the parish of *Leake* was liable to repair the part of the road indicted, then the verdict of guilty was to stand; if not, then a verdict of not guilty to be entered. This case was argued last *Easter* term (a).

1833.

—
The King
against
The Inhabit-
ants of
LEAKE

Whitchurst, for the crown, contended, first, that it was competent to the commissioners, in whom the soil was vested, to dedicate a part of it to the use of the public as a highway, and that if it was so, it was clear that such dedication had taken place; secondly, that it was not necessary, to charge the parish, that it should have adopted the highway; and, thirdly, that if it was, the parish had adopted it. Upon the first point he argued that, as by the 41 G. 3. c. 135. the lands, when purchased, were to be conveyed to the commissioners, and entirely divested from the vendors, the commissioners were owners of the fee; and as such might dedicate the surface of the soil as a road to be used by the public. The fact that the commissioners here were trustees for a special purpose did not shew that they had no power. In *The Rugby Charity v. Merryweather* (b), the owners of the fee simple were trustees, and it was not objected that they could not dedicate. [Parke J. They were only trustees as to the profits; they acted as ordinary owners.] In *Rex v. Edmonton* (c), the dedication, if any, was by the churchwardens of *Edmonton*, who were trustees for the owners of freehold messuages within the parish of *Edmonton*; and it was held that the road was public, and that the parish were liable to repair. That is a direct authority that the commissioners in

(a) Before Denman C. J., Littledale and Parke Js.

(b) 11 East, 375. note (a).

(c) 2 Moody & M. 24.

1833.

—
The King
against
The Inhabit-
ants of
LEAKE.

this case may dedicate. So, in *Rex v. Wright (a)*, commissioners under an inclosure act had been empowered to set out public and private roads; the former to be repaired by the township, the latter by such persons as the commissioners should direct: and the public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as private, and eight yards wide; but in setting it out, a space of sixty feet was left between the fences, and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road; and *Parke J.*, who tried the cause, thought the commissioners had exceeded their authority in awarding that a private road should be repaired by the township, but left it to the jury to decide whether the road, though originally meant to be a private road, had not subsequently been dedicated to the public; and this Court, on motion for a new trial, held that the case had been properly submitted to the jury. [*Parke J.* There the lord, or owner of the adjoining land, was the person to dedicate.] There can be no doubt that some person had the power to dedicate. In *Rex v. Mellor (b)*, the point might have been raised, but was not. It may be further contended here that the commissioners could not dedicate the use of this part of the bank to the public, because the public right to use it as a highway may interfere with the purposes for which the soil was vested in the commissioners. But, first, the bank itself is not necessary for the purposes of draining the fen. The commissioners are authorised to make cuts and drains; and as, in

(a) 3 B. & Ad. 681.

(b) 1 B. & Ad. 32.

order to do so, they must dig out the soil where these cuts and drains are made, it became necessary to provide a place for depositing the soil: but with reference to the drainage of the fen, it was wholly unimportant what became of that soil. The commissioners are expressly authorised to dispose of the soil arising from the cuts and drains in forming on each side thereof banks six feet distant from the verge of the slopes. They might clearly give the public the right of using the surface of that bank as a road, unless such use of it necessarily impedes the draining of the fen. It is found, as a fact, that the public have used it as a highway for twenty-five years; it is not stated that during that period such public user has ever, in any degree, impeded the draining of the land, and it is not to be presumed that it will do so in future: it lies on the defendants, at least, to shew that the right of the public so to use it must, of necessity, impede the draining of the fen. Secondly, it is clear that, by common law, the inhabitants of a parish are bound to repair all public highways within it. Where a road, by user, has become a public highway, no adoption of it by the inhabitants of the parish is necessary to make them liable. The doctrine that an adoption by the parish is necessary to make the parish liable to repair, was first stated by Bayley J. in *Rex v. The Inhabitants of St. Benedict* (a); but it is not supported by any other authority, and has not been generally approved of in the profession. Thirdly, supposing an adoption by the parish necessary, they have here, in fact, repaired not only a part of the road, but the very part indicted.

1833.

—
The King
against
The Inhabitants of
LEAKE.

(a) 4 B. & A. 450.

1833.

The KING
 against
 The Inhabit-
 ants of
 LEAKE.

Waddington contra. The road in question was not a public highway: first, because it could not become so; and secondly, if it could, it has not. The land was vested in the commissioners for the purpose of executing the drainage works mentioned in the act of parliament; they made a bank, and the public have used the surface of that bank as a highway; the user, as explained, began by usurpation. The commissioners having no occasion for the bank, permitted the public to use the surface of it, which was not required for the purposes of the drainage: that was not evidence for the jury to presume a dedication. But even if the commissioners had wished and intended to dedicate the surface to the public, they could not do so consistently with the other duties which they are required to perform. By section 12. the commissioners are authorised to dispose of all the earth and soil arising from the cuts and drains therein directed to be made, scoured, and cleansed, in forming banks, and they are to make, *alter*, support, repair, or remove, all cuts, drains, &c. Non constat that it may not become necessary for the purpose of *altering* the drains adjoining the bank, for the commissioners to take possession of this bank, and thereby obstruct the highway; but supposing the argument on the other side to prevail, if they do so, they may be indicted for a nuisance. It might be their duty to build on this bank, if that became necessary for the purposes of the drainage. [*Littledale J.* The fact ought to have been found by the jury, whether the powers of the commissioners could have been exercised consistently with the public right to use this as a highway. It is possible tunnels might be made through the bank without endangering the road.] There is no authority to shew that

that persons holding land for public purposes, inconsistent with a right of way, may dedicate the use of that land to the public. In *The Rugby Charity v. Merryweather* (a), the dedication was by trustees for private purposes. In *Rex v. Edmonton* (b) the road had been actually set out by commissioners under an inclosure act, and the churchwardens were only trustees for certain landowners.

Secondly, according to the opinion of *Bayley J.* in *Rex v. St. Benedict* (c), an adoption by the parish is necessary, to make the parish liable to repair a road, and that doctrine is recognised by Lord *Tenterden* in *Rex v. Cumberworth* (d). Lastly, if an adoption by the parish be necessary, the single instance of repair ten years ago is not conclusive evidence of such adoption.

Cur. adv. vult.

There being a difference of opinion on the bench, the Judges delivered their opinions seriatim.

PARKE J. The questions raised on the argument of this case were three :

1st, Whether it was competent for the persons in whom the soil was vested, to dedicate the use of part of it, to the public, as a highway ; it not being disputed but that if they had the power, such dedication had taken place.

2dly, Whether it is necessary in order to charge the parish, that it should have adopted the highway ; and if it was,

(a) 11 *East*, 375. note (a).

(c) 4 *B. & A.* 450.

(b) 1 *Moody & M.* 24.

(d) 5 *B. & Ad.* 112.

1833.

The King
against
The Inhabit-
ants of
LEAKE.

1833.

**The King
against
The Inhabit-
ants of
LEAKE.**

3dly, Whether the parish had in fact adopted it.

I have never entertained the least doubt upon any of these questions, except the first; upon that I have felt some difficulty; but after much consideration, my opinion is, upon the statements in this case, that the commissioners in whom the property was vested might dedicate part of it to this special use.

If the land were vested by the act of parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the act, then I think it clear that the commissioners have that power. The mere circumstance of their not being beneficial owners, cannot preclude them from giving the public this right.

Let us consider, then, whether the special purposes, indicated by the act of parliament, are inconsistent with the use of the bank as a highway.

The land over which the alleged road passes was purchased by the special commissioners appointed under the 41 G. 3. c. 135., under section 19. of that act: whether it was conveyed to them or their appointees, under section 19., on a voluntary purchase; or, under section 26. and 27., after an assessment by a jury, to the special commissioners in trust for the general commissioners, does not appear; but, in whomsoever the title was vested, it must have been held in trust for the special purposes of the act.

What, then, were these special purposes?

The case does not state whether the powers given by
the

the 41 G. 3. c. 135. to the special commissioners appointed under that act have terminated or not.

By section 11. they are authorised, empowered, and required to make certain new gowts and drains; and by section 12. to dispose of the earth arising from making the drains six feet from the verge of the slopes or batters at an average, or otherwise, as they shall think necessary: they are also required to make and maintain such other cuts, drains, outlets, sluices, gowts, tunnels, and other works as they shall think necessary, in the grounds in the *East Fen*, &c. (comprising the lands adjoining to this cut.)

By section 14. the several cuts, works, &c., before directed to be executed by the special commissioners, shall be done under the direction and control of the general commissioners; and shall, after the *completion thereof*, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the general commissioners, as if made, done, and executed under the authority of the former act.

By section 39. the special commissioners are to make an award, with a true plan annexed, of the grounds to be drained.

The forty-first section gives the general commissioners the power to tax for the purposes of general drainage.

From these clauses it appears that the special commissioners have special powers, which seem not to have been of a permanent nature, and which would be determined after the works were completed and the award made; and then the authority of the general commissioners of drainage, under the 2 G. 3., would alone be in force. But, as the case does not enable us

1833.

The KING
against
The Inhabit-
ants of
LEAKE.

1833.

—
The King
against
The Inhabit-
ants of
LEAKE.

to say whether the powers of the special commissioners, if any, which remained after the drain was made, are yet in force, we must treat the question as if they were; though, probably, the general commissioners, by virtue of the act of 2 G. 3. enabling them to make works for the general purpose of drainage, would have the same power of making cuts, drains, and other works, as is given to the special commissioners under the latter part of the twelfth section.

The general commissioners would unquestionably be entitled, and indeed bound, to cleanse the *Hobhole* drain when required, and remove the mud from it.

The special commissioners, and probably the general commissioners also, would have the power, if necessary for the purposes of the general drainage, to make smaller cuts communicating with this; and drains, gowts, tunnels, or other works; and might use the soil on which the bank is placed for this purpose.

The question then is reduced to this, whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers?

The case might and ought to have stated whether the operation of cleansing the drain would or would not have been impeded by the use of this road; but as it does find that the drain was constructed in the manner directed by the act, and the act requires six feet to be left between the verge of the slope and the bank, which must have been for the purpose of allowing sufficient space for cleansing the drain, I think we may reasonably conclude that the use of the top of the bank itself, for the purpose of cleansing the drain or depositing the mud there, was unnecessary.

With

: With respect to the exercise of the other powers, of making cuts communicating with this drain through the bank in question, or other works necessary to the drainage, it is impossible not to see that such powers could no longer be exercised upon the space occupied by the road, if the public had an unqualified right of road there; and unless they had, this indictment cannot be supported. But I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public. The special commissioners certainly might have sold the land, or let it, or disposed of it for money, under sect. 35., if it was not necessary to be made use of for the purposes of this act; and I do not see why they might not also, in the like case, have given it up to the public as a public highway: inasmuch as it is by no means impossible, that the general works of the drainage might receive a benefit perhaps equal to the pecuniary advantage from a sale, by facilitating the carriage of materials, and the transport of workmen, necessary for the purposes of the drainage.

As the public have enjoyed the road without interruption for twenty years and upwards, we must infer that no purpose of the drainage has yet required the construction of cuts or other works upon the part of the bank in question; and if in that time the ordinary purposes of the drainage have not required them, it is not too much to say, that such works will not be required, and that the space is not now wanted for any purposes of this act.

If this were a special verdict, I should have thought that both these facts should have been found by the jury, and that a venire de novo would have been necessary;

but

1838.

—
The King
against
The Inhabit-
ants of
LEAKE.

1833. *but upon a special case, we are not so strictly bound ; and I do not think we ought to put the parties to the expense of a new trial on that account.*

—
The King
against
The Inhabit-
ants of
LEAKE.

I am of opinion, therefore, upon this case, that we may come to the conclusion, that the dedication of this part of the bank to the use of the public, as a road, was not inconsistent with the purposes to which the commissioners, whether special or general, were bound by the act of parliament to apply it.

Upon the other two questions, I never had any doubt. As to the second, I have always considered it as clear that the parish is at common law bound to repair all *public* highways; this being by the common law, the mode by which each parish contributes its share towards the public burthen of repairing all highways, instead of all the public roads being repaired by one general tax. Hence, if a road *be dedicated* to the public, no parish can refuse to repair it. It must bear in that shape its share of the general burthen, and its inhabitants receive an equivalent, not in the use of that road in particular, but in the use of all the public roads in the realm. The absence of repair by the parish is indeed a strong circumstance, in point of evidence, to prove that the road is not a public one,—the fact of repair has a contrary effect; but the conduct of the parish in acquiescing or refusing its acquiescence is, in my opinion, immaterial in every other point of view.

The judgment of Mr. Baron *Bayley* in the case of *Rex v. St. Benedict (a)*, was cited on the argument as an authority to the contrary; but with every respect for that very learned Judge, I must say I cannot accede to

(a) 4 B. & A. 450.

the doctrine there laid down, and I am not aware that there is any authority in support of it.

Upon the third question, also, I feel no doubt. The repair by the parish of the part in question is undoubtedly a sufficient adoption, if adoption be necessary, which I am clearly of opinion it is not.

Upon the whole, therefore, I am of opinion that the crown is entitled to our judgment.

LITLEDALE J. A great number of cases have been cited as to what shall be taken to be a dedication of land to the public, so as to establish a highway. I need not advert to these, because I agree in their authority; and I think if this land was not in the peculiar circumstances in which it is placed, there would be a sufficient dedication to make it a public highway.

But the difficulty I have is, that the land over which the road lies has been appropriated by the act of the 41 G. S. c. 135. for the purposes of drainage; and by that act certain powers are given to the commissioners to deal with the land mentioned in the act in the manner there prescribed; and under their powers they have made a bank which is subservient to the purposes of the drainage. Over a part of this bank the road in question extends.

It is true that the bank has not, for a great number of years, been practically used to give any further *protection or support* of the works than it did when first made, and very probably it never may be wanted in any other state than that in which it now is.

But I cannot take judicial notice of that, and I cannot say but at some future time it may be wanted for the works of the drainage, in such a manner as that it could not

1833.

The King
against
The Inhabit-
ants of
LEAKE.

1833.

The KING
against
The Inhabit-
ants of
LEAKE.

not be used beneficially for these purposes if there was a common highway over it. And I think the commissioners had no power to dedicate to the use of the public as a highway, land which they were entrusted with the ownership of, for a special purpose, and for which special purpose this land may at some future period be required; and as all the king's subjects are presumed to know acts of parliament, they, when they used the road, must be presumed to have known that in point of law it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by parliament, and which, therefore, could not be infringed upon.

The adoption of the parish, by repairing part of it, does not vary the case: the adoption of a parish is no more than the use of it by the public; the parish are merely a part of the public.

If a road has been used by people in the parish, it furnishes evidence *pro tanto* of its being a way for the rest of the public; and if the parish have repaired it, it furnishes a strong inference that it is a public highway, or else they would not have been at that expense: but it only raises a strong presumption, and there is no estoppel against a parish in such a case; the adoption by the parish does not necessarily, as a matter of law, make a road public; nor does their refusal to adopt it, prevent its being so. And if it as a general rule do so, still it would not be the case here, as parliament has already directed it to be under the control of commissioners for parliamentary purposes.

A public road has been made by legal authority, in
continuation

continuation of what is now contended to be a road; but that can make no difference as to the legality of this road.

If the use of this as a public road be an object of great importance, the only way to have it made a legal road is by an application to parliament, who will exercise their discretion on the subject.

On the whole of the case, I am of opinion that judgment should be entered for the defendants.

DENMAN C. J. The question raised by this case was, whether the parish of *Leake* is bound to repair a road which runs along the top of a bank forty feet wide; in other words, whether this, which is unquestionably a road de facto, is also a road de jure. The bank was made in execution of certain works of drainage done under an act of the second of G. 3., and another act of the forty-first of G. 3.; and it is stated as a fact that "the said bank has been used by all persons for about twenty-five years as a public carriage-road without intermission, and is a very useful and convenient road to the public." It is further stated, that part of the indicted portion of the road was repaired by the parish of *Leake* ten years ago.

All the terms in the definition of a public road are found in this statement. But it was argued that the bank in question cannot be a public road, because that would be inconsistent with the purposes of drainage for which it was raised, and with the superintending power vested in the commissioners for drainage purposes. The words relied on are, that "all banks made (as this was) under the 41 G. 3., as well as the cuts, drains, dams, forelands, and other works," should be made,
done,

1833.

The King
against
The Inhabit-
ants of
LEAKE.

1855.

**The King
against
The Inhabit-
ants of
LEAVE.**

done, and executed under the direction and control, and to the satisfaction, of such general commissioners, and should, after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done, and executed under the authority of the former act above mentioned.

We must therefore refer to the provisions of the former act, to see if it directs the banks to be maintained or regulated in any manner inconsistent with a right of passage over them.

The former act gives power to the general commissioners to purchase lands for the purposes of the drainage, the purchased lands to be divested from the vendors and vested in the general commissioners. It appears that the general commissioners, by virtue of this power, purchased certain inclosed land, and the special commissioners cut a drain through it, and, with the soil cast out, made the bank (forty feet wide) over which the indicted road runs.

The argument for the defendants at the bar proceeded on the assumption that the bank of a drain must, of necessity, be subject to obstruction from laying upon it soil out of the ditches, and from other obvious causes, so as to render the constant user of it as a public road impossible. But I think that we cannot draw such an inference judicially from the act; and the case does not allege the fact to be so.

The words which place these banks under the control of the general commissioners are not of very clear import; but their primary object seems to be to exclude them

them from the control of the special commissioners appointed by the subsequent act, who, after making them to the satisfaction of the general commissioners, were to have no more concern with them. The words of the clause referred to in the earlier act, and above stated, seem rather applicable to a property in the banks than to any mode of managing them. The words are certainly very extensive; sufficiently so, indeed, to enable the commissioners to devote the surface of the banks to any purpose whatever not inconsistent with the trust of draining the district. Now it can hardly be but that good roads should be extremely useful for the general purposes of the drainage, by facilitating the conveyance of persons and property; and such roads may be more easily procured and maintained by giving a right of passage to the public and casting the repair upon parishes, than by any other means enjoyed by the commissioners. The case states that a part of this very bank, being a continuation of the indicted road, was set out as a road in 1820 by virtue of an inclosure act; and it does not appear that the general commissioners saw any reason to complain. I think, therefore, it is reasonable to infer that they, like the rest of the public, acquiesced in this use of the soil, from finding that their duties as commissioners might be perfectly discharged notwithstanding. And this appears by no means improbable in point of fact, when the width of the bank is remembered.

A second point was, that the parish was not stated to have adopted the road, but only to have repaired it on one occasion. If the fact of adoption were necessary, this statement of evidence from which it might be inferred would be insufficient. But I by no means think
any

1838.

The King
against
The Inhabit-
ants of
LEAM.

1833.

**The King
against
The Inhabit-
ants of
LEAKE.**

3dly, Whether the parish had in fact adopted it.

I have never entertained the least doubt upon any of these questions, except the first; upon that I have felt some difficulty; but after much consideration, my opinion is, upon the statements in this case, that the commissioners in whom the property was vested might dedicate part of it to this special use.

If the land were vested by the act of parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the act, then I think it clear that the commissioners have that power. The mere circumstance of their not being beneficial owners, cannot preclude them from giving the public this right.

Let us consider, then, whether the special purposes, indicated by the act of parliament, are inconsistent with the use of the bank as a highway.

The land over which the alleged road passes was purchased by the special commissioners appointed under the 41 G. 3. c. 135., under section 19. of that act: whether it was conveyed to them or their appointees, under section 19., on a voluntary purchase; or, under section 26. and 27., after an assessment by a jury, to the special commissioners in trust for the general commissioners, does not appear; but, in whomsoever the title was vested, it must have been held in trust for the special purposes of the act.

What, then, were these special purposes?

The case does not state whether the powers given by
the

the 41 G. 3. c. 135. to the special commissioners appointed under that act have terminated or not.

By section 11. they are authorised, empowered, and required to make certain new gowts and drains; and by section 12. to dispose of the earth arising from making the drains six feet from the verge of the slopes or batters at an average, or otherwise, as they shall think necessary: they are also required to make and maintain such other cuts, drains, outlets, sluices, gowts, tunnels, and other works as they shall think necessary, in the grounds in the *East Fen*, &c. (comprising the lands adjoining to this cut.)

By section 14. the several cuts, works, &c., before directed to be executed by the special commissioners, shall be done under the direction and control of the general commissioners; and shall, after the *completion thereof*, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the general commissioners, as if made, done, and executed under the authority of the former act.

By section 39. the special commissioners are to make an award, with a true plan annexed, of the grounds to be drained.

The forty-first section gives the general commissioners the power to tax for the purposes of general drainage.

From these clauses it appears that the special commissioners have special powers, which seem not to have been of a permanent nature, and which would be determined after the works were completed and the award made; and then the authority of the general commissioners of drainage, under the 2 G. 3., would alone be in force. But, as the case does not enable us

1833.

The KING
against
The Inhabit-
ants of
LEAKE.

1833.

—
The King
against
The Inhabit-
ants of
LEAKE.

to say whether the powers of the special commissioners, if any, which remained after the drain was made, are yet in force, we must treat the question as if they were; though, probably, the general commissioners, by virtue of the act of 2 G. 3. enabling them to make works for the general purpose of drainage, would have the same power of making cuts, drains, and other works, as is given to the special commissioners under the latter part of the twelfth section.

The general commissioners would unquestionably be entitled, and indeed bound, to cleanse the *Hobhole* drain when required, and remove the mud from it.

The special commissioners, and probably the general commissioners also, would have the power, if necessary for the purposes of the general drainage, to make smaller cuts communicating with this; and drains, gowts, tunnels, or other works; and might use the soil on which the bank is placed for this purpose.

The question then is reduced to this, whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers?

The case might and ought to have stated whether the operation of cleansing the drain would or would not have been impeded by the use of this road; but as it does find that the drain was constructed in the manner directed by the act, and the act requires six feet to be left between the verge of the slope and the bank, which must have been for the purpose of allowing sufficient space for cleansing the drain, I think we may reasonably conclude that the use of the top of the bank itself, for the purpose of cleansing the drain or depositing the mud there, was unnecessary.

With

With respect to the exercise of the other powers, of making cuts communicating with this drain through the bank in question, or other works necessary to the drainage, it is impossible not to see that such powers could no longer be exercised upon the space occupied by the road, if the public had an unqualified right of road there; and unless they had, this indictment cannot be supported. But I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public. The special commissioners certainly might have sold the land, or let it, or disposed of it for money, under sect. 35., if it was not necessary to be made use of for the purposes of this act; and I do not see why they might not also, in the like case, have given it up to the public as a public highway: inasmuch as it is by no means impossible, that the general works of the drainage might receive a benefit perhaps equal to the pecuniary advantage from a sale, by facilitating the carriage of materials, and the transport of workmen, necessary for the purposes of the drainage.

As the public have enjoyed the road without interruption for twenty years and upwards, we must infer that no purpose of the drainage has yet required the construction of cuts or other works upon the part of the bank in question; and if in that time the ordinary purposes of the drainage have not required them, it is not too much to say, that such works will not be required, and that the space is not now wanted for any purposes of this act.

If this were a special verdict, I should have thought that both these facts should have been found by the jury, and that a venire de novo would have been necessary;

but

1833.

—
The King
against
The Inhabit-
ants of
LEARN.

1833. disagreement, had caused the breaking off of the arbitration.

In the Matter
of *TUNNO* and
BIRD.

The case was then referred to *Staples* as umpire. *Murray* furnished him with a statement in detail of the claims of *Tunno* against *Bird*, and the grounds of such claims, and *Lakin* sent him a similar statement, with all the depositions made before him on the reference, including some taken by him after the disagreement with *Murray*; and *Staples*, in an affidavit, stated, that having inspected these several documents, and having, on the days when he attended the reference, minutely examined the premises for the purpose of being competent to form a judgment if appointed umpire, he considered it unnecessary to go into further evidence, or examination of the parties. *Bird*, in his affidavit, complained of the omission, and stated that it was material and important for him that *Staples* should have heard him and his witnesses before making his award.

The umpire awarded that *Bird* should pay *Tunno* 518*l*. The award was dated *January* 29th, 1833.

The Solicitor-General (with whom was *Crowder*) now shewed cause. As to the first point: the specific agreement between the parties distinguishes this case from others, where it has been held that an umpire could not be chosen by lot. And the written appointment here was drawn and attested by *Bird's* agent, and made a rule of court, with the acquiescence, at least, of both parties: for if *Bird* had originally wished to enforce this objection, he might have moved to set aside the rule. Secondly, it is objected, that the submission to arbitration being by deed, a new arbitrator could not
be

be substituted by an instrument not under seal. But this was the appointment of *Bird* himself, signed by him, attested by his attorney, and made a rule of court pursuant to the submission: and *Bird* sanctioned the acts of *Lakin* as arbitrator. The last two objections are answered by the affidavits.

1833.

In the Matter
of *TUNNO* and
BIRD.

D. Pollock and *Lumley*, *contra*, were called upon by the Court. On the first point, this case does not essentially differ from *Ford v. Jones* (a). There the principal parties not only consented to the appointment by lot, but were present at it: *Littledale J.*, however, seems to intimate in that case, that the acquiescence of the parties will not remove the objection. It appears, too, in this case, that *Bird*, in the assent which he gave, was merely acting on the suggestion of *Jellicoe*, the arbitrator at that time appointed on his side, and did not know of the objection there might be to the proceeding. *Lakin* acquiesced afterwards, because he considered the matter already decided. But the umpire ought to be one whom the arbitrators personally know and approve of: *In re Cassell* (b). The mere absence of objection, even on the part of *Jellicoe*, was not sufficient. As to the second question, the appointment by an instrument under seal could not be altered by a mere indorsement in writing. But if the Court should think that the subsequent conduct of *Bird* has removed this objection, there is still no sufficient answer to those upon the merits of the arbitration itself. The arbitrators cannot be said to have differed in opinion, when one of them did not hear all the evidence. They should have heard the whole, and

(a) 3 B. & Ad. 248.

(b) 9 B. & C. 624.

1883.

In the Matter
of Tunno and
Riad.

then joined in a statement to the umpire, as in *Hall v. Lawrence (a)*. But here, during the arbitration, *Murray* took offence, and ceased to attend. [*Denman C. J.* The arbitrator appointed on your side handed over the papers to the umpire afterwards, without making this objection.] Then as to the conduct of the umpire; after hearing part of the case in company with the arbitrators, he withdrew from the enquiry. [*Taunton J.* That was before he was called in as umpire. *Parke J.* No such objection was raised on your part when he was about to make his award.] At all events, after he was called in as umpire, he should have given the parties the opportunity of producing evidence. In *Hall v. Lawrence (a)*, it was said, that such an objection could not prevail, because the parties did not apply to have evidence received till after the award was made. Here, the umpire had partly heard the evidence before the arbitrators ceased to act, and the parties had no intimation that he was about to make his award without hearing the rest: otherwise they would have applied to him to hear the whole *vivâ voce*. [*Taunton J.* You lie by and take the chance of the award, and when disappointed, come to the Court to set it aside for the non-reception of evidence, which the umpire was never required to hear.]

DENMAN C. J. I am of opinion that this rule must be discharged. As to the appointment of an umpire by lot, the law, as laid down *In the Matter of Cassell (b)*, is, that a choice by lot is bad, and the appointment must be the act of the will and judgment of the two arbitrators, "unless the parties consent to or acquiesce in

(a) 4 T. R. 589.

(b) 9 B. & C. 624.

some other mode." Now, here they did so. In *Ford v. Jones* (a), indeed, there is some language a little more general, but the decision there probably went upon some difference in the affidavits of the respective parties, for *Littledale J.* says, "such assent must always be a matter of doubt," which shews that a difficulty was felt there in getting at the real facts. To the second objection, it is a sufficient answer that *Bird*, by his attorney, signed the memorandum. As to the arbitrators not having differed; it may be that they did not go through the whole of the evidence and then differ, but that took place, which in fact put an end to their authority as arbitrators: and it is clear, that *Lakin*, the arbitrator on *Bird's* side, was of that opinion. Then it is said that the umpire did not hear the evidence. But it is not, in every case, necessary that an umpire should do so. If, indeed, a necessity had arisen, and the parties had called upon him to examine witnesses, his declining to do so might have been a ground of objection. But here there was no such refusal. At the time when he left the parties, and declined to hear more of the evidence, he was not yet umpire. When all the evidence had been taken, it was put into his hands; and he had already said that if he required further information, he would call a meeting. It is said, *Bird* did not know that the umpire was going to make his award; but a party must be supposed to look after his own interest: he knew that the depositions were before the umpire, and should, if he thought it necessary, have called on him to hear evidence. He has not done so, but has taken the chance of the award. I think he cannot now raise this objection.

1833.

In the Matter
of *TUNNO* and
BIRD.

(a) 3 B. & Ad. 248.

1833.

**In the Matter
of TUNNO and
BRAN.**

PARKER J. I am of the same opinion. As to the first point, on a submission of this kind, *primâ facie* the appointment of an umpire ought to be determined by the judgment of the arbitrators; but it is competent to the parties to agree that it shall be decided by chance, or to acquiesce in its being so decided. An agreement subsequent to the original submission, that a person so appointed shall act as umpire, is a new submission, and will bind the parties, at least as to an application like the present. Whether, under circumstances like these, an attachment would issue for non-performance of the award (it having been made a rule of Court) may be a different question: this is not the case of an attachment or an action, but a motion by one of the parties to set the award aside. *Ford v. Jones* (a) only confirms the doctrine laid down *In the matter of Cassell* (b). It is true, in *Ford v. Jones* something was proved of an acquiescence by the parties, but that cannot have been very strong, for it is not insisted upon in shewing cause, and *Littledale J.* says, "such assent must always be a matter of doubt." If that means that the appointment would be bad although the parties assented, I cannot agree in the proposition; but I think what was said there proceeded on the want of any sufficient proof of assent or acquiescence. With regard to the second objection, the agreement for changing one of the arbitrators was a new and distinct agreement, though not under seal, incorporating the original one; and I have no doubt that the parties are bound, as to this application, by the award made under it, for the reason I have already given in adverting to the first ob-

(a) 3 B. & Ad. 248.

(b) 9 B. & C. 624.

jection.

jection. It is unnecessary to add any thing on the other points.

1893.

In the Matter
of *TUNNO* and
BIRD.

TAUNTON J. On the last three points, it is only necessary to say that I agree with my Lord. On the first I will say a word or two, as I was a party to the decision in *Ford v. Jones* (a). If the present case were in all points the same as that, I should pause before I could say I was satisfied that the opinions of the Court there expressed, were wrong. But my concurrence, in the present case, will not clash with those, or with the decision *In the matter of Cassell* (b). Lord Tenterden there lays it down as a general rule, "that the appointment of the third person must be the act of the will and judgment of the two, must be matter of choice, and not of chance, *unless the parties consent to or acquiesce in some other mode.*" Now here ample evidence is given that they did "consent or acquiesce." *Bird* knew and approved of the selection of six names, and took part in the arrangement by which they were subjected to the chance of drawing. And after that had been done, the indorsement appointing the umpire was witnessed by *Bird's* agent in his presence. The fact, therefore, that the appointment was by chance, may be thrown out of consideration here, for there was an appointment of an umpire by the arbitrators, in *Bird's* presence, and there attested by his own agent. To hold this an insufficient appointment, would be impeaching the solemn act of the parties.

PATTESON J. It is an answer to the last objection, that at the only time when *Staples* refused to hear

(a) 3 B. & Ad. 248.

(b) 9 B. & C. 624.

further

1833.

In the Matter
of *TUNNO* and
BIRD.

further evidence, he was not umpire. On the second and third points, I agree with the rest of the Court. As to the first, I have no distinct recollection of the manner in which the case of *Ford v. Jones* was put to the Court; but I think the circumstance of the parties having been present at the choice of an umpire by lot, and consenting to it, was not strongly brought to their attention. It does not appear to have been insisted upon in shewing cause. I can hardly think, if it had distinctly appeared that the parties agreed to the mode of choice, the Court would have decided as it did. But here, the party making this application gave an express consent by letter; and the appointment, when indorsed upon the articles of reference, was attested by his own agent in his presence. There is no doubt here, that the parties both consented to and directed the mode of choice.

Rule discharged (a).

(a) On reference to the papers in *Ford v. Jones*, it appears that in an affidavit in support of the rule, *Powell*, one of the arbitrators, stated that the defendant was "neither party nor privy" to the choice of the umpire, and, on being informed of it, objected; and the defendant himself stated, in an affidavit, that after being informed of the appointment, he found on enquiry that *R. M.*, the umpire, was not a proper person; and he "was also much dissatisfied with the way in which *R. M.* had been appointed." But the affidavits in answer contained the following statements, part of which was read to the Court in shewing cause:—

Harper, the other arbitrator, deposed, "That it was agreed to by this deponent and the said *W. Powell*, and also by the plaintiff and defendant, that an umpire should be named to decide the said matters agreeably to the said agreement of reference, and various names were mentioned, and among them the name of *R. M.*, of, &c. That this deponent, the said *W. Powell*, and also the said plaintiff and defendant, met on the 7th day of April 1830, at the office of *M. T. D.*, attorney at law at *Abergavenny*, when the name of the said *R. M.* was proposed by this deponent, and *T. K.*, of, &c., by the said *W. Powell*. That neither this deponent nor the said *W. Powell* objected to the person named by the other of them, when it was proposed by some one present, but deponent cannot state who

who in particular, that the said two names should be put into a hat, and that the one drawn should be the umpire. That with the consent of all parties present, and including the said plaintiff and defendant, *Thomas Baker*, a clerk to the said *Mr. Davis*, then wrote the said two names on two slips of paper, and put them into a hat. That the said *Mr. Davis* then drew out the name of *R. M.*, whereupon it was agreed to and resolved on by all parties, including the plaintiff and defendant, that he the said *R. M.* should act as umpire." *Ford*, the plaintiff, deposed (after having stated the meeting of the parties, including the defendant, and the nomination of different umpires, who were not objected to), that "it was proposed by some one, and, as deponent thinks, by the said *Mr. Davis*, that the said two names should be written on two strips of paper, and drawn out of a hat. That the clerk of *Mr. Davis* accordingly wrote the said two names on two strips of paper, and put the same into a hat, and the said *Mr. Davis* drew the name of *R. M.*; when, with the consent of all parties, a memorandum was written on the said agreement, appointing the said *R. M.* to be the umpire to decide the said matters in dispute."

It seems probable that the observation of *Littledale J.* referred only to a consent under such circumstances as appeared on these affidavits.

1868.

In the Matter
of TURNO and
BIAN.

• REID and Another, Executors of ELIZABETH
STENTON, against DICKONS.

Monday,
Nov. 4th.

ASSUMPSIT. Declaration stated, that whereas the defendant, in the lifetime of the testatrix, to wit, on the 24th of *March* 1824, made his promissory note in writing, and thereby promised to pay the testatrix 231*l.* by several instalments on the days therein specified; and, if default should be made in any one or more of the payments for thirty days after the same respectively became due, then the whole, or the whole of the remainder of the 231*l.* and interest should become due on demand. It then stated, that the defendant, on the 24th of *March* 1824, delivered the note to the testatrix, and promised to pay her according to the tenor and effect thereof. Breach, non-payment of any of the

Payment of money into court on a count on a promissory note payable by instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note: it does not bar the statute of limitations as to a further sum claimed to be due on the same note.

1833.

Run
against
Dickons.

the instalments, though the several times for payment had long since elapsed. Upon this count the defendant paid into court 11*l.* 10*s.* 6*d.*, and pleaded the general issue and the statute of limitations. At the trial before *Taunton J.*, at the Summer assizes for the county of *Nottingham*, 1833, the plaintiffs produced the rule for paying money into court, and contended that the effect of that payment was to entitle them to recover the whole residue of the instalments and interest, unless the defendant could prove payment. On the part of the defendant, *Long v. Greville (a)* was cited, to shew that where a defendant pleads the general issue and the statute of limitations, and pays money into court generally, such payment does not take the case out of the statute. The learned Judge nonsuited the plaintiffs, but reserved liberty to them to move to enter a verdict for the difference between the sum paid into court and that claimed to be due upon the note.

Whitehurst now moved accordingly. In *Long v. Greville*, which was an action for goods sold and delivered, it is stated by the Court, that where money is paid into court on a declaration setting forth a special contract, that is admitted as alleged. [*Denman C. J.* And it is further stated, "that in no case has the effect gone beyond admitting that the sum paid in is due."] The payment of money into court on the special count admits the plaintiffs' right of action on the special contract therein stated. [*Denman C. J.* To the amount of money paid into court. Suppose, after six years had expired, the defendant had written a letter and said,

(a) 3 B. & C. 10.

"I have

"I have paid you all but 110*l*," and at the trial had not proved any payment, would the letter be an admission of a debt due beyond 110*l*.?] *Dyer v. Ashton* (a) shews that the defendant, by paying money into court on this special contract, admitted the whole contract set out in that count. If the defendant had paid the 110*l*. to the plaintiffs, the effect of that would have been to take the case out of the statute of limitations.

1833.

 RIND
 against
 DICKSON.

DENMAN C. J. The payment of money into court on the special count merely admits the defendant's liability on the contract therein stated to the amount of 110*l*.

PARKE J. The payment of money into court admits the contract as alleged, and a right to recover 110*l*.; but beyond that sum, every defence is open. It is much the same thing as if the defendant had admitted the contract, and stated at the same time that no more than 110*l*. 10*s*. 6*d*. was due upon it.

PATTESON J. In *Cox v. Parry* (b), it was decided that payment of money into court is an acknowledgment, by the defendant, of the contract, and that the plaintiff is entitled to recover the sum so paid; but that it did not preclude him from taking any objection limiting the operation of the contract, in order to bar the plaintiff from recovering more than had been paid into court. The principle of that case applies here.

Rule refused.

(a) 1 B. & C. 3.

(b) 1 T. R. 464.

1833.

*Tuesday,
Nov. 5th.*GRIFFITH, Gent., one, &c. *against* DAVIES.

A witness may be called upon by the plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant.

THIS was an action on an attorney's bill. At the trial before *Denman C. J.*, at the sittings in *London* after last *Trinity* term, it became a question whether or not the plaintiff had been employed by the defendant. To prove the retainer by the defendant, a witness, also an attorney, was called, who stated that, after the business in question had been done, he, as the then attorney of defendant, went with him to the plaintiff, and on that occasion heard a conversation between them respecting a proposed compromise of the plaintiff's demand. The jury found a verdict for the plaintiff.

Heaton now moved for a new trial, on the ground that this witness ought not to have been allowed to give evidence of a negotiation at which he had been present as attorney to one of the parties; and he cited *Gainsford v. Grammar (a)*, where Lord *Ellenborough* held, that a witness could not be called upon to disclose propositions which he, as the defendant's attorney, had carried to the plaintiff, respecting the subject matter of the suit.

DENMAN C. J. The fact of the witness having been present as attorney on one side, does not prevent his giving evidence of a conversation between the parties.

(a) 2 Camp. 9.

PARKE J. There is no pretence for the objection. This is not a confidential disclosure, but an open communication from one adversary to another, witnessed by the attorney of one party. In *Gainsford v. Grammar*(a), the Lord Chief Justice might properly reject the attorney's evidence of what his client said to him, but not his statement of what he himself afterwards said to the opposite party.

TAUNTON J. concurred.

PATTESON J. This was not a confidential disclosure to the attorney, but merely a conversation between the plaintiff and defendant. I do not understand the case in *Campbell*: there was a well-founded objection there to the attorney's stating what his client had communicated to him; but I do not see why he should have been prevented from stating at the trial what he had already communicated to the opposite party. So, here, the disclosure objected to is of something which had already been said to the plaintiff.

Rule refused (b).

(a) 2 Camp. 9.

(b) In *Gainsford v. Grammar*, Lord Ellenborough's attention does not appear to have been particularly called to the present question; the whole contest there being, whether or not the attorney bore a privileged character at the time of the communication.

1833.

GRAFFITH
against
DAVIES.

1853.

Tuesday,
Nov. 5th.HOWELL *against* BATT.

Defendant was office-keeper of an *Exeter* and *London* coach, and servant to C., a proprietor at *Exeter*, where the office kept by defendant was. Defendant from time to time made up accounts of the shares of profits, due to the several proprietors, and sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion defendant sent to plaintiff, a proprietor, a packet purporting to contain 23*l.*, which was due to him, but in reality containing 20*l.* only. Plaintiff sued defendant for 3*l.* had and received to his use:

Held, that defendant was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from

this defence by having told the plaintiff (after action brought) that he, defendant, had had the 23*l.* of C. and sent it to the plaintiff, and debited C. with it.

ASSUMPSIT for money had and received. At the trial before *Alderson J.*, at the last assizes at *Exeter*, the facts of the case appeared as follows:—The plaintiff was a joint proprietor of a stage-coach running from *Exeter* to *London*. The defendant was office-keeper and servant to *Clench*, the proprietor at *Exeter*; and used, in his capacity of office-keeper, at stated intervals, to make up the share-bills of the coach, and to take sums of money from a balance of *Clench's* which he had in hand, and send them to the several joint proprietors as their respective shares of the profits of the coach. On one of these occasions 23*l.* were due to the plaintiff; and the defendant made up a packet, purporting to contain that sum, and sent it to the plaintiff as his share, as usual, by the guard of the coach. The packet contained 20*l.* only; and this action was brought for the difference. It appeared that the expenses of keeping the office were provided for by the defendant, for which he received money from the proprietors. He rendered his accounts to *Clench*, the *Exeter* proprietor. No sum of money was expressly given to him by *Clench* for the plaintiff. Upon this evidence it was contended, that *Batt* was improperly made defendant, for that there had been no privity of contract between him and the plaintiff; and it was said that, there having been no specific

appropriation

appropriation by *Clench* of any sum to be paid to the plaintiff, the defendant could not be charged as having received any sum to the plaintiff's use. It was therefore contended that the action should have been brought against *Clench*. It appeared, however, that the plaintiff's attorney, after commencing the action, had written to a gentleman at *Exeter*, who was called as a witness, stating his view of the case, and requesting him to examine *Clench* and other persons as witnesses, which letter contained the following expressions:—"A sum of 23*l.* was given to or left by Mr. *Clench* with the defendant to be transmitted to the plaintiff."—"The action has proceeded on the assumption that Mr. *Clench* will prove that he gave to or left with the defendant the sum of 23*l.*, the plaintiff's money, for the plaintiff, to be forwarded to him." This letter being shewn to and read by the defendant, he said "it was perfectly true; he had the money of *Clench* and sent it to the plaintiff, and debited *Clench* with it." *Clench* had also written a letter to the plaintiff containing these words: "Defendant says 23*l.* was inclosed; with that sum he has charged me in account, and I have paid it;" and this letter being shewn to defendant, he observed on it in similar terms. The learned Judge directed a nonsuit, giving leave to move to enter a verdict for 3*l.*

1835.

 HOWELL
 against
 BART.

Dampier now moved accordingly. Supposing it to be rightly objected (on the authority of *Stephens v. Badcock* (a)) that there was no privity of contract between the plaintiff and defendant, the latter being *Clench's* servant and not the plaintiff's; still the plaintiff,

(a) 3 B. & Ad. 354.

1833.

—
In the Matter
of *Tunno and*
Biao.

further evidence, he was not umpire. On the second and third points, I agree with the rest of the Court. As to the first, I have no distinct recollection of the manner in which the case of *Ford v. Jones* was put to the Court; but I think the circumstance of the parties having been present at the choice of an umpire by lot, and consenting to it, was not strongly brought to their attention. It does not appear to have been insisted upon in shewing cause. I can hardly think, if it had distinctly appeared that the parties agreed to the mode of choice, the Court would have decided as it did. But here, the party making this application gave an express consent by letter; and the appointment, when indorsed upon the articles of reference, was attested by his own agent in his presence. There is no doubt here, that the parties both consented to and directed the mode of choice.

Rule discharged (a).

(a) On reference to the papers in *Ford v. Jones*, it appears that in an affidavit in support of the rule, *Powell*, one of the arbitrators, stated that the defendant was "neither party nor privy" to the choice of the umpire, and, on being informed of it, objected; and the defendant himself stated, in an affidavit, that after being informed of the appointment, he found on enquiry that *R. M.*, the umpire, was not a proper person; and he "was also much dissatisfied with the way in which *R. M.* had been appointed." But the affidavits in answer contained the following statements, part of which was read to the Court in shewing cause: —

Harper, the other arbitrator, deposed, "That it was agreed to by this deponent and the said *W. Powell*, and also by the plaintiff and defendant, that an umpire should be named to decide the said matters agreeably to the said agreement of reference, and various names were mentioned, and among them the name of *R. M.*, of, &c. That this deponent, the said *W. Powell*, and also the said plaintiff and defendant, met on the 7th day of April 1830, at the office of *M. T. D.*, attorney at law at *Abergavenny*, when the name of the said *R. M.* was proposed by this deponent, and *T. K.*, of, &c., by the said *W. Powell*. That neither this deponent nor the said *W. Powell* objected to the person named by the other of them, when it was proposed by some one present, but deponent cannot state
who

who in particular, that the said two names should be put into a hat, and that the one drawn should be the umpire. That with the consent of all parties present, and including the said plaintiff and defendant, *Thomas Baker*, a clerk to the said *Mr. Davis*, then wrote the said two names on two slips of paper, and put them into a hat. That the said *Mr. Davis* then drew out the name of *R. M.*, whereupon it was agreed to and resolved on by all parties, including the plaintiff and defendant, that he the said *R. M.* should act as umpire." *Ford*, the plaintiff, deposed (after having stated the meeting of the parties, including the defendant, and the nomination of different umpires, who were not objected to), that "it was proposed by some one, and, as deponent thinks, by the said *Mr. Davis*, that the said two names should be written on two strips of paper, and drawn out of a hat. That the clerk of *Mr. Davis* accordingly wrote the said two names on two strips of paper, and put the same into a hat, and the said *Mr. Davis* drew the name of *R. M.*; when, with the consent of all parties, a memorandum was written on the said agreement, appointing the said *R. M.* to be the umpire to decide the said matters in dispute."

It seems probable that the observation of *Littledale J.* referred only to a consent under such circumstances as appeared on these affidavits.

1888.

In the Matter
of *TUNNO* and
BIAN.

REID and Another, Executors of *ELIZABETH*
STENTON, against *DICKONS.*

Monday,
Nov. 4th.

ASSUMPSIT. Declaration stated, that whereas the defendant, in the lifetime of the testatrix, to wit, on the 24th of *March* 1824, made his promissory note in writing, and thereby promised to pay the testatrix 231*l.* by several instalments on the days therein specified; and, if default should be made in any one or more of the payments for thirty days after the same respectively became due, then the whole, or the whole of the remainder of the 231*l.* and interest should become due on demand. It then stated, that the defendant, on the 24th of *March* 1824, delivered the note to the testatrix, and promised to pay her according to the tenor and effect thereof. Breach, non-payment of any of the

Payment of money into court on a count on a promissory note payable by instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note: it does not bar the statute of limitations as to a further sum claimed to be due on the same note.

1833.

—
 Run
 against
 DICKENS.

the instalments, though the several times for payment had long since elapsed. Upon this count the defendant paid into court 110*l.* 10*s.* 6*d.*, and pleaded the general issue and the statute of limitations. At the trial before *Taunton J.*, at the Summer assizes for the county of *Nottingham*, 1833, the plaintiffs produced the rule for paying money into court, and contended that the effect of that payment was to entitle them to recover the whole residue of the instalments and interest, unless the defendant could prove payment. On the part of the defendant, *Long v. Greville (a)* was cited, to shew that where a defendant pleads the general issue and the statute of limitations, and pays money into court generally, such payment does not take the case out of the statute. The learned Judge nonsuited the plaintiffs, but reserved liberty to them to move to enter a verdict for the difference between the sum paid into court and that claimed to be due upon the note.

Whitehurst now moved accordingly. In *Long v. Greville*, which was an action for goods sold and delivered, it is stated by the Court, that where money is paid into court on a declaration setting forth a special contract, that is admitted as alleged. [*Denman C. J.* And it is further stated, “that in no case has the effect gone beyond admitting that the sum paid in is due.”] The payment of money into court on the special count admits the plaintiffs’ right of action on the special contract therein stated. [*Denman C. J.* To the amount of money paid into court. Suppose, after six years had expired, the defendant had written a letter and said,

(a) 3 B. & C. 10.

“ I have

"I have paid you all but 110*l*," and at the trial had not proved any payment, would the letter be an admission of a debt due beyond 110*l*.?] *Dyer v. Ashton* (a) shews that the defendant, by paying money into court on this special contract, admitted the whole contract set out in that count. If the defendant had paid the 110*l*. to the plaintiffs, the effect of that would have been to take the case out of the statute of limitations.

1833.

 Rule
against
Dickens.

DENMAN C. J. The payment of money into court on the special count merely admits the defendant's liability on the contract therein stated to the amount of 110*l*.

PARKE J. The payment of money into court admits the contract as alleged, and a right to recover 110*l*.; but beyond that sum, every defence is open. It is much the same thing as if the defendant had admitted the contract, and stated at the same time that no more than 110*l*. 10*s*. 6*d*. was due upon it.

PATTESON J. In *Cox v. Parry* (b), it was decided that payment of money into court is an acknowledgment, by the defendant, of the contract, and that the plaintiff is entitled to recover the sum so paid; but that it did not preclude him from taking any objection limiting the operation of the contract, in order to bar the plaintiff from recovering more than had been paid into court. The principle of that case applies here.

Rule refused.

(a) 1 B. & C. 3.

(b) 1 T. R. 464.

1839.

DOMETT
against
BECKFORD.

defendant, and were shipped and consigned by *W. Jackson*, his attorney in *Jamaica*, on the account and risk of the defendant, and afterwards delivered to *Plummer* and *Wilson* as his consignees in *London*, and were sold by them as such consignees, and the net proceeds thereof, after setting off the freight and charges in question, were carried by them to the credit of the defendant's account with them. *Plummer* and *Wilson* stopped payment on the 27th of *November* 1830; and a commission of bankrupt issued against them in the *December* following, under which they were found and declared bankrupts, and the amount in question had not then, nor has it since, been paid to the plaintiffs."

For the defendant, it was contended, that the plaintiffs, having undertaken by the bill of lading (which was the only evidence of the contract between the parties) to deliver to the consignees, they paying freight, were bound to withhold the goods from the consignees until payment of the freight; and having delivered them without having insisted on such payment, they had no claim on the consignor, and *Drew v. Bird (a)* was relied upon. On the other hand, it was contended, for the plaintiffs, that from the fact stated in the bill of lading that goods had been laden on board the plaintiffs' ship, and bound for *London*, and were to be delivered there, the law would imply a contract on the part of the owner of those goods to pay freight, and that the clause in the bill of lading as to the consignee's paying freight was introduced solely for the benefit of the shipowners, to enable the latter to receive payment from the consignees, if they thought fit, and that it did

(a) 1 *Moody & M.* 156.

not preclude the shipowners, in default of payment by the consignees, from suing the consignors; and *Barker v. Havens*, cited in the *American* edition of *Abbott on Shipping*, and in 1 *Moody & M.* 157. note (a), was referred to. The Lord Chief Justice was of opinion, that the defendant, the owner of the goods, and on whose account they were shipped, was *prima facie* liable to pay freight, and that the clause in the bill of lading, "that the goods were to be delivered to the consignees, they paying freight for the same," being introduced merely for the benefit of the master or shipowner, did not make it compulsory on the latter to withhold the delivery of the goods until payment of freight by the consignee, and, consequently, that the owner of the goods was not discharged from his primary liability by the neglect of the shipowner to obtain payment from the consignee. The defendant then called several witnesses to shew, that by the custom of merchants in the port of *London*, the shipowner, by delivering the goods to the consignee named in the bill of lading, lost all claim on the consignor; but he failed in establishing that custom, and a verdict was found for the plaintiffs, liberty being reserved to the defendant to move to enter a nonsuit.

F. Pollock, in this term, moved accordingly. The only evidence of any contract to pay freight was the bill of lading signed by the agent of the plaintiffs. By that the plaintiffs undertook to deliver the goods in *London* to the consignees, they paying freight. There was no evidence of any contract by the consignor to pay freight, and the law will not, under these circumstances, imply

1833.

 DOMESTIC
 AGAINST
 BECKFORD.

quashing the first order of removal, was because the pauper, at the time when it was made, was not chargeable, it must also be competent to the removing parish, in this case, to give evidence that he was irremovable for a temporary cause. *Rex v. Wheelock* (a) is also a direct authority to shew that such evidence is admissible. There, this Court refused a mandamus to the justices at sessions to make a special entry on their proceedings, that an order of removal was quashed for want of proof of chargeability, because the respondent, on the trial of another appeal against another order of removal of the same party, might explain by evidence the particular ground on which the former order was quashed. [*Taunton J.* It would be most inconvenient, and would lead to great expense, if it were competent to parties to give parol evidence to explain the particular ground of the judgment.] That objection would apply in many other cases, where a judgment in a former action does not specify the particular ground on which it proceeded. Where a judgment is pleaded in bar, and the real merits of the action have not been at all enquired into in the former proceeding, issue may be taken on the fact: *Hitchen v. Campbell* (b). A recovery in one action is no bar of a second, where, on the trial of the first action, no evidence was given in support of the claim on which the second is founded, *Seddon v. Tutop* (c). If there be a reference of all matters in difference between the parties, and, after an award is made, either party bring an action against the other for a matter in difference which subsisted at the time of the submission, parol evidence may be given to

1838.

—
The Kive
against
The Inhabit-
ants of
Wick
St. LAWRENCE.

(a) 5 B. & C. 511.

(b) 2 W. Bl. 779. 827. 3 Wils. 304.

(c) 6 T. R. 607.

shew

1898.

~~Hodding v. Edwards~~
~~Baron v. Husband~~

under the circumstances, is entitled to say that 23*l.* were paid by *Clench* to the defendant, and received by him, for the special purpose of being forwarded to the plaintiff. Supposing the fact to be otherwise, he cannot allege so, for he is concluded by the statement which he himself made to the plaintiff, and on which that party has acted. In *Edwards v. Hodding* (a) this point was ruled by *Dampier J.* at *Nisi Prius*, though the Court, upon motion afterwards, gave no opinion upon it, there being another sufficient ground for discharging the rule for a new trial. [*Denman C. J.* Here the statement which is said to have misled the plaintiff, was after action brought.] The plaintiff continued acting on a mistake by reason of it. [*Parke J.* Is *Clench* discharged by what has taken place?] If the defendant, by his admission, has made himself liable, a judgment against him would discharge *Clench*.

DENMAN C. J. The supposed admission is, that he has sent the 23*l.* There is nothing to distinguish this case from *Baron v. Husband* (b) which was lately decided here.

PARKE J. It does not appear that *Clench* might not have countermanded the payment to the plaintiff, at any time before he actually received the money. Nor is it shewn that the plaintiff has been induced to do any act on the faith of receiving payment from the defendant. If it had been proved that the defendant had, as it were, attorned to the plaintiff, and agreed to hold the money for his use, and not subject to the direction of *Clench*,

(a) 5 Taunt. 815.

(b) 4 B. & Ad. 611.

the case would have been different. But that does not appear.

1833.

Howell
against
Barr.

TAUNTON and PATTESON Js. concurred.

Rule refused.

DOE dem. GRUBB *against* The Earl of
BURLINGTON.

EJECTMENT for premises in *Buckinghamshire*. On the trial before *Gaselee J.*, at the *Buckinghamshire* summer assizes 1832, it appeared that the premises in question were part of a copyhold tenement; that the lessor of the plaintiff was the lord, and the defendant the copyholder; and that the plaintiff's lessor claimed by virtue of a forfeiture alleged to have been incurred by the pulling down of a barn on the premises by the defendant's tenant. It was proved that the barn, which was not built by the copyholder, had been so pulled down; and the jury found (upon questions put separately to them by the learned Judge), first, that the tenant, at the time of pulling down the barn, did not intend to rebuild it; secondly, that the property would not have been damaged if the barn had not been rebuilt; thirdly, that according to the custom of the manor, the copyholder might pull down what he had himself built, but nothing else. A verdict was taken for the plaintiff, and the learned Judge reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained in *Michaelmas* term 1832,

If a copyholder pull down a barn, without any intention of rebuilding, the lord cannot recover the place from him, on the ground of a forfeiture, if the jury find that the premises are not damaged.

1833.

Don dem.
 Gains
 against
 The Earl of
 Bunslow.

The *Solicitor-General*, *Storks Serjt.*, and *Kelly*, shewed cause in *Trinity* term last (a). This is not a question on the statute of *Gloucester* (b), between a termor and a freeholder, but turns upon the relation between a copyholder and his lord. Under the statute there must be damage to a certain amount, and the thing wasted is to be recovered with treble damages: a copyholder holds on condition of committing no waste; and, on breach of that condition, he forfeits his whole estate. The question then is, whether the pulling down of an ancient barn be waste. That is a general question of law. It is not to be left to the discretion of a copyholder to judge whether the estate will be thereby improved or not: it is a matter to be determined by the lord only, who may licence it if he pleases. The authorities on this subject are collected in *Comyn's Digest*, *Copyhold*, M. 3. (c), from which it is clear that it is waste to pull down any building. The case of *The Keepers of Harrow School v. Alderton* (d), which turned on the statute of *Gloucester*, was against a tenant for years; and there the defendant was permitted to enter up judgment because there were only three farthings damages on the three closes. There a passage of *Bracton* (e) was cited to the effect that waste shall be no injury, unless it be so trifling that inquisition ought not to be made. That seems to be spoken only of landlord and tenant. And in *Pindar v. Wadsworth* (g), which was an action on the case by a commoner for an injury done to his right of common, the case of *The Keepers of*

(a) Before *Dewman C. J.*, *Littleale*, *Parks*, and *Patteson J.*

(b) 6 Ed. 1. c. 5.

(c) See also *Co. Lit.* 53. a.

(d) 2 B. & P. 86.

(e) *Lib.* 4. c. 18. s. 12. fol. 316. b.

(g) 2 East, 154.

Harrow School v. Alderton was distinguished; and it was held that the plaintiff might have judgment, though the damages were only one farthing. The statute of *Gloucester* furnishes the only case in which the civil law maxim "de minimis non curat lex" has been applied. In *Cole v. Green* (a), which was an action of waste on the immemorial custom of *London*, it was held, that pulling down houses and erecting others in their stead was waste, though the annual rent was thereby improved from 120*l.* to 200*l.* In *The City of London v. Greyme* (b) it was said, that the conversion of a corn-mill to a horse-mill was waste, though it were to the lessor's advantage. In *Lord Darcy v. Ashworth* (c), it is laid down as generally true that the lessee has no power to change the nature of the thing demised; that he cannot turn meadow land into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of park." Converting two chambers into one, or e converso, or converting a hand-mill into a horse-mill, is waste: *Hal. MSS. Co. Litt.* 53. a. not. (3). So a tenant cannot make rails where none were before: *Hal. MSS. Co. Litt.* 53. b. not. (4) (d). So in case for injury to the reversion, brought against a stranger, it was held sufficient for the plaintiff to shew any alteration, although the property were thereby improved: *Alston v. Scales* (e). Cases to the same effect are collected in 2 *Rolle's Abridgment*, 815. *Waste*. In fact, property must always suffer by an

1833.

Don dem.
Gains
against
The East of
Bullington.

(a) 1 *Les.* 309. *S. C.* not *S. P.* 2 *Saund.* 228. as *Greene v. Cole*.

(b) *Cro. Jac.* 182.

(c) *Hob.* 234. (ed. 1734.)

(d) Citing *Dyer*, 332. (*Manwood v. Myme.*) In this case the question seems to have been, for what erections on the land the tenant was justified in cutting down timber.

(e) 9 *Bing.* 3.

1833.

Doz dem.
Graves
against
The Earl of
BURLINGTON.

alteration which affects the evidence of its identity. Suppose the fine for alienation were uncertain, and to be assessed according to the value for the time being (a), and the alienation were to take place after a building had been pulled down and before it was rebuilt, the lord's fine would be diminished, though, ultimately, the new building was of greater value than the old one.

Sir *J. Scarlett* and *Austin* contra. If there be any distinction between the application of the law of forfeiture for waste to landlord and tenant, and that to lord and copyholder, it cannot be more peremptorily applied in the latter case than in the former. The landlord is a real loser by the waste: the lord loses nothing, for he has no practical enjoyment of the inheritance. A lessee holds the land subject to the conditions annexed to the particular species of estate, as much as a copyholder. The arguments as to the deterioration which might ensue from the loss of evidence, or diminution of fines, are inapplicable here, because the jury have negatived the production of any damage. *Cole v. Green* (b) was a case of landlord and tenant, and there the evidence of the title was injured; if that case be applicable generally, a copyholder could not build a new house on his land. [Parke J. According to *Watkins on Copyholds* (c), he could not.] If *Lord Darcy v. Ashworth* (d) be applicable, a copyholder cannot plough up land which has not been ploughed before. But that rule appears to be qualified as to any occupier. In 2 *Rolle's Abr.*, 814. *Waste*, l. 47., it is said, that where, by the custom of the country, it is good husbandry to plough the meadow, and it is for the

(a) *Com. Dig. Copyhold*, H. 4.(b) 1 *Lev.* 309.(c) *Vol. i. c. 8. pp. 531, 532.*(d) *Hob.* 254. (ed. 1724.)

amelioration of the meadow, it is not waste to plough it. The general rule is, that the law will not allow that to be waste which is not any ways prejudicial to the inheritance: per *Richardson C. J.* in *Barret v. Barret* (a). Thus in 2 *Rolle's Abr. Waste*, p. 815. pl. 17, 18. it is said, that it is waste to pull down a house and rebuild a smaller, or a larger; the reason given in the latter case is, that the new house will be a greater charge to the lessee; which brings the question to the same test. In *Keil*. 38. (b) it is said, that if a lessee plead, in waste for pulling down a house, that he has built a larger, if it be to the lessor's advantage, he may shew it. The division of a meadow into many parts, by making ditches, is said not to be waste, for the meadows may be the better for it: *Vin. Abr. Waste*, D. 46. The change of one kind of mill for another may be waste; but that would be from the change in the nature of the property causing some damage. In *Alston v. Scales* (c) there was actual damage done, though very minute; and the Court said that it altered the evidence of the title. The Court looks to the actual effect upon the value of the interest of the reversioner; this rule has been adopted in actions on the case for injury to the reversion, as in *Jesser v. Gifford* (d), *Jackson v. Pesked* (e), *Strother v. Barr and Another* (g), *Ferguson v. Cristall* (h), *Young v. Spencer and Another* (i). The passage in *Bracton* mentioned on the other side is perfectly general; and it was written

1833.

For dem.
Gauth
against
The Earl of
Burlington.

(a) *Het.* 35.(b) Per *Constable*, arg. in the *Abbot of Stratford's* case, assented to by *Brian C. J.* of C. P., *Keil.* 39.(c) 9 *Bing.* 3.(d) 4 *Burr.* 2141.(e) 1 *M. & S.* 234.(g) 5 *Bing.* 156.(A) 5 *Bing.* 304.(i) 10 *B. & C.* 145.

1893.

DOX dem.
GRUBB
against
The Earl of
BURLINGTON.

before the statute of *Gloucester* passed: and the inquiry; there spoken of, answers to the verdict of a jury now. *Bracton's* doctrine is recognised in Lord *Coke's* first(a) and second(b) institutes, and in *Topping v. King* (c). In the case of a copyhold, the Lord Chancellor doubted whether a legal forfeiture was incurred by the copyholder working a quarry, as to which it did not appear whether it had been opened before the copyholder's time; or by grabbing up boundary hedges, as to which it did not appear whether they were between parts of the copyhold or between the copyhold and adjoining freehold; and by topping timber trees: *Peachy v. The Duke of Somerset* (d). So it was doubted whether it were waste for a copyholder in fee to dig or open mines, in *Lord Rutland v. Gie* (e). The erection of a new house on a copyhold, without licence, was held to be no forfeiture, as being for the improvement of the tenement, though the nature of the land was altered: *Cecill v. Cave* (g). In *Simmons v. Norton* (h), it was held that, in support of a general plea of nul wast, evidence could not be given that the act was in conformity to the custom of the country, and in amelioration of the land; but that was a decision merely as to the proper method of raising the question on the record. In *Burton's Law of Real Property* (i) it is said, "The tenant of a copyhold estate of inheritance may also forfeit that estate by waste. But reason seems to require that the waste which is attended with such penal consequences should be either an invasion of the lord's property, as by cutting down trees without being autho-

(a) *Co. Litt.* 54. a.(b) 2 *Inst.* 306. (11).(c) *Winch.* 5.(d) 1 *Sir.* 447.(e) 1 *Sid.* 152.(g) *Vin. Abr. Copyhold*, L. c.(h) 7 *Bing.* 640.

(i) 411. (1335.) (ed. 1830.)

rized by the custom; or, at least, some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity. To this last reason may also be referred the forfeiture which is incurred by an inclosure, or other alteration of boundaries." [Parker J. Suppose the barn had been the sole object of the grant.] In that case the act might have destroyed the identity of the property, and then the jury would probably have found that it did damage. In ejectment against a termor, upon a special proviso in the lease, giving a right of re-entry upon the commission of waste to the value of 10s., it was held that, when buildings of more than that value had been pulled down and others substituted for them, the jury should have been directed to ascertain whether, on the whole, waste had been committed to the value of 10s.: *Doe dem. Earl of Darlington v. Bond and Others* (a); and Bayley J. gave as a reason, that it was possible that the value of the reversion might be increased by the alteration.

1888.

Doe dem.
Gauze
against
The Earl of
Burlington.

Cur. adv. vult.

DENMAN C. J. in the course of this term delivered the judgment of the Court.

This was an ejectment for ten messuages, in the manor of *Princes Risborough*, in the county of *Bucks*, which was, after a former trial, again tried before my brother *Gaselee* and a special jury at the Summer assizes 1882, for that county. The lessor of the plaintiff was lord of the manor of *Risborough*, and the defendant was a copyhold tenant of that manor; and the

(a) 5 B. & C. 855.

premises

1838.

Dee. dech.
GAVE
against
The Earl of
BURLINGTON.

premises for which the ejectment was brought were in the occupation of a tenant. On the 31st of *May* 1819, *Charles Currie* was admitted tenant of the premises, in trust for Lord *George Henry Cavendish* (now the Earl of *Burlington*), the defendant. The premises, as described in the admission, were a messuage or farmhouse, with all outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, and backsides thereto belonging, and also certain lands therein particularly mentioned and described. There were two barns on the premises: one of them was in a ruinous state, and was pulled down by the tenant. Leave was asked of the steward to take it down, but it was refused: the barn was some time afterwards rebuilt by the defendant. The ejectment was brought for alleged waste, in having taken down and removed the barn without license.

Upon the evidence given on the trial, the Judge left three questions to the jury.

1st. Whether, at the time when the barn was pulled down, the defendant had an intention to rebuild it; for that if he had, there was no ground of forfeiture.

2dly. Whether any damage was occasioned to the estate by the pulling down and rebuilding the barn; stating, that if they found there was not, he would reserve for the opinion of the Court whether this was an answer to the action.

3dly. As to the existence of the custom, and particularly whether it authorised the pulling down all buildings generally, or only those additional ones which the tenant himself had erected.

The jury found that the defendant did not contemplate the rebuilding the barn; that the estate would have sustained no damage if the barn had not been rebuilt;

rebuilt; that by the custom, a man may pull down what he has built, but not generally.

A verdict was taken for the plaintiff, with liberty for the defendant to move to enter a nonsuit, if, upon the finding respecting damage, the Court think him entitled so to do.

By the general custom of copyholds, if a copyholder commits waste, it is a forfeiture, *Com. Dig. Copyhold, M. 3.*; for which he cites 1 *Roll. 508.*, l. 31.; *Moore, 892.*; and *Owen, 17.*; in which last case it is said that all waste done by a copyholder is forfeitable.

In the quotation from *Roll. Abr.*, the language is, if a copyholder commits waste *against the custom of the manor*, this is a forfeiture; and for that he cites *Clifton v. Molyneux (a)*, where the qualification is stated that it must be waste, *according to the custom of the manor*.

But without considering whether the custom of the manor need be taken into consideration or not, the custom here found is, that the copyholder may pull down what he has built, but not generally.

Then a question arises, is the pulling down a barn waste?

The instances and cases where waste has been considered as applicable to buildings, are almost all as to houses or mills; but there are some where waste has been assigned as to outbuildings. In *Brooke's Abridgment, Waste*, pl. 67., waste was assigned, among other things, in a stable. In *Dyer, 108.*, it was assigned in a stable. In *Rastal v. Turner (b)*, which was a case of forfeiture of copyholds for waste in *burning an outhouse*, no doubt was made as to its being a *forfeiture* by the

(a) 4 *Coke*, 37.

(b) *Cro. Eliz.* 598.

1838.

Don de.
Gave
against
The Earl of
Bentinck.

1833.

Don dem.
Gaves
against
The Earl of
BURLINGTON.

person who did it; but the case was decided on its being done in collusion for some purposes as to the estate, or the person connected with the copyhold.

In *Townsend's* and *Cornwall's Tables of Pleading*, there are several precedents referred to of waste being assigned in various sorts of outbuildings. And in the statute of *Marlbridge*, 52 Hen. 3. c. 24., it is enacted "that farmers, during their terms, shall not make waste nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to farm." And though waste be by the common law, this may be considered as a legislative exposition of the subjects in which waste may be committed. On the words, "nor of any thing belonging to the tenements which they have to farm," Lord *Coke*, in the 2d *Institute*, 146., says, "there were before particularly named de domibus boscis et hominibus;" and these other words, "of any thing belonging to the tenements that they have to farm," comprehend lands and meadows belonging to the farm.

Lord *Coke*, therefore, must be supposed to consider that the word *houses* includes all outbuildings; if not, the general words here used would certainly extend to them.

We are, therefore, of opinion, that the pulling down a barn, taken absolutely, is such waste as subjects the copyhold tenant to a forfeiture. But there is another principle applicable to waste, that is, the smallness of the value, and there are a great number of old authorities to say, that if the value be very small, the consequences of waste do not attach.

They will be found collected in 2 *Roll's Abr.* 824., *Comyn's Dig.* Tit. *Copyhold*, M. 3. and *Waste*, E. 1.

Viner's

Viner's Abr. Tit. Copyhold, K. c., and Waste, N. 2 Saunders, 259., Green v. Cole, notes. See also The Keepers of Harrow School v. Alderton (a). Some of these authorities are not directly in point, for they are decided upon the statute of Gloucester, and in actions of waste, and between landlord and tenant. And it is laid down by Lord Chancellor Loughborough, in Dench v. Bampton (b), that an action of waste will not lie between a lord of a manor and a copyholder. But they are illustrations of the principle, that where there are no damages there can be no waste; and to this effect is the case of Barret v. Barret (c), where C. J. Richardson said, "The law will not allow that to be waste which is not any ways prejudicial to the inheritance."

Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or, thirdly, by impairing the evidence of title. And this law is distinctly laid down by C. J. Richardson in *Barret v. Barret*, cited at the bar from *Hetley's Reports (c)*. This case is entirely clear of the two former grounds; and as the jury have found that the defendant did no damage to the estate, it follows that there was no waste and no forfeiture. The rule must, therefore, be made absolute.

Rule absolute.

1833.

—
Dor dem.
Gains
against
The Earl of
BURLINGTON.

(a) 2 Bos. & Pul. 86.

(b) 4 Ves. jun. 706. (See *Richards v. Noble*, 5 Mer. 675.)

(c) *Hetley*, 35.

1833.

Thursday,
Nov. 7th.

MACARTHUR *against* CAMPBELL.

On a reference of a cause and all matters in difference by a Judge's order, one of the parties moved, after the proper time, to set the award aside: Held, no excuse for the delay, that the arbitrator made an exorbitant charge for the award, in consequence of which the party now applying did not take it up.

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges; whether they be reasonable or not.

THIS cause, and all matters in difference between the parties, were, by an order of Lord *Tenterden*, referred to an arbitrator; the costs of the suit and reference to abide the event of the award. The arbitrator, on the 18th of *November* 1832, gave notice that he had made his award, ready to be delivered, on payment of his charges: but the plaintiff, considering the charges exorbitant, did not take up the award, and, consequently, remained in ignorance of its contents till the 14th of *March* 1833, when he received a duplicate of the award from the defendant, in whose favour it was. The award bore date the 12th of *November* 1832. The order of reference having been made a rule of Court, the plaintiff, in *Easter* term 1833, obtained a rule nisi for setting the award aside, on several grounds, of which the exorbitant charge was one.

Sir *James Scarlett* now shewed cause, and contended that the application came too late, and that the plaintiff's objection to pay the arbitrator's demand was no excuse for the delay; to which point he cited *Musellbrook v. Dunkin* (a).

Follett contra. This, being a reference under a Judge's order, is not within 9 & 10 *W. 3. c. 15. s. 2.*, and therefore it was not necessary that the motion

(a) 9 *Bing.* 605.

should

should have been made in the next term after the award was published. [*Parke J.* The Court adopts the provision of that statute as a rule in other cases.] At all events, the circumstances of this case take it out of the rule. [*Denman C. J.* You do not state that you applied for the award, and that it was refused because an exorbitant fee was not paid; though I do not know that even that would be sufficient.] In *Musselbrook v. Dunkin (a)*, *Tindal C. J.* says, referring to the words of the statute, which directs that a motion to set aside an award shall be made before the last day of the term next after the award shall have been made and published:—“The question is, what is meant by the word *published*? I think that word is satisfied by the award’s having been made, and notice having been given to the parties that it is within their reach, on payment of just and reasonable expences.” Then the award here was not published on the 13th of *November*, for the parties were not then informed that it could be had on such terms. The Lord Chief Justice proceeds:—“And I concur in thinking that the award cannot be said to be ready, when it is only to be had on submitting to a wrongful demand.” Now, to discharge this rule upon the ground suggested, the Court must decide that an award is published, when notice has been given to the parties that it is to be had on payment of an exorbitant demand. It is not clear that there was any authority by which these charges could have been taxed; and, if so, the plaintiff could take no course but that which he has adopted. [*Parke J.* If the award was not published when the notice was given to the parties, the arbitrator

1833.

MACARTHUR
against
CAMPBELL.

(a) 9 Bing. 605.

might

1893.

MACARTHUR
against
CAMPBELL.

might have altered it afterwards, which will scarcely be contended. That shews that the publication of an award is not merely its being ready on payment of a moderate sum.

DENMAN C. J. We are all of opinion that the plaintiff ought to have come to the Court sooner; and we do not think the Court would have a difficulty in dealing with an arbitrator who made exorbitant charges. If the ground alleged for the delay in this case were held available, litigation might be kept up for ever. It is indeed said by the Lord Chief Justice in *Musselbrook v. Dunlin* (a), that an award is published when the parties have notice that it is within their reach on payment of such expenses as are just and reasonable. But I think these last words need not form part of the definition.

PARKE, TAUNTON, and PATTERSON J^s. concurred.

Rule discharged.

(a) 9 Bing. 606.

1833.

DOMETT and Others *against* BECKFORD.

INDEBITATUS assumpsit for freight, primage, and pierage, due from the defendant to the plaintiffs, in respect of the carriage of certain goods and merchandize mentioned in the declaration. Plea, general issue. At the trial before *Denman C.J.*, at the *London* sittings after *Trinity* term 1833, the following facts were admitted:—"The goods mentioned in the declaration were shipped in the island of *Jamaica* on board the ship *William Bryan*, belonging to the plaintiffs, according to the following bill of lading:—"Shipped, in good order and well conditioned, by *W. Jackson*, in the ship *William Bryan* bound for *London*, 145 hogsheads of sugar and forty-eight puncheons of rum, on account of *W. Beckford, Esq.*, being marked and numbered as in the margin, and are to be delivered at the *West India Docks* in the port of *London* (with the usual risks expressly excepted), unto Messrs. *Plummer and Wilson*, or to their assigns, paying freight for the said sugar at 5s. sterling per hundred weight, and rum at 6d. sterling per imperial gallon, with primage and average accustomed." The arrival of the ship was reported on the 30th of *August* 1830, and a freight note for 622l. 10s. 4d. (which was admitted to be the just amount of the freight, primage, and pierage, payable for the shipment and carriage of the goods) was, on that day, delivered by the agents of the plaintiffs, who reported the ship to *Plummer and Wilson*, the consignees named in the bill of lading. The goods were the property of the

In indebitatus assumpsit for freight, it appeared that goods were laden in *Jamaica* on board the plaintiffs' ship, according to a bill of lading, which stated them to have been shipped by *W. J.* on a vessel bound for *London* on account of the defendant, and that they were to be delivered in *London* to the consignees, paying freight for the same at the rate therein mentioned; the goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees without receiving the freight, it was held that the defendant was liable by law to pay the freight to the shipowners; and that independently of any express contract by charterparty.

VOL. V.

M m

defendant,

1833.

DOMETT
vs.
BACKFORD.

defendant, and were shipped and consigned by *W. Jackson*, his attorney in *Jamaica*, on the account and risk of the defendant, and afterwards delivered to *Plummer* and *Wilson* as his consignees in *London*, and were sold by them as such consignees, and the net proceeds thereof, after setting off the freight and charges in question, were carried by them to the credit of the defendant's account with them. *Plummer* and *Wilson* stopped payment on the 27th of *November* 1830; and a commission of bankrupt issued against them in the *December* following, under which they were found and declared bankrupts, and the amount in question had not then, nor has it since, been paid to the plaintiffs."

For the defendant, it was contended, that the plaintiffs, having undertaken by the bill of lading (which was the only evidence of the contract between the parties) to deliver to the consignees, they paying freight, were bound to withhold the goods from the consignees until payment of the freight; and having delivered them without having insisted on such payment, they had no claim on the consignor, and *Drew v. Bird (a)* was relied upon. On the other hand, it was contended, for the plaintiffs, that from the fact stated in the bill of lading that goods had been laden on board the plaintiffs' ship, and bound for *London*, and were to be delivered there, the law would imply a contract on the part of the owner of those goods to pay freight, and that the clause in the bill of lading as to the consignee's paying freight was introduced solely for the benefit of the shipowners, to enable the latter to receive payment from the consignees, if they thought fit, and that it did

(a) 1 *Moody & M.* 156.

not preclude the shipowners, in default of payment by the consignees, from suing the consignors; and *Barker v. Havens*, cited in the *American* edition of *Abbott on Shipping*, and in 1 *Moody & M.* 157. note (a), was referred to. The Lord Chief Justice was of opinion, that the defendant, the owner of the goods, and on whose account they were shipped, was *prima facie* liable to pay freight, and that the clause in the bill of lading, "that the goods were to be delivered to the consignees, they paying freight for the same," being introduced merely for the benefit of the master or shipowner, did not make it compulsory on the latter to withhold the delivery of the goods until payment of freight by the consignee, and, consequently, that the owner of the goods was not discharged from his primary liability by the neglect of the shipowner to obtain payment from the consignee. The defendant then called several witnesses to shew, that by the custom of merchants in the port of *London*, the shipowner, by delivering the goods to the consignee named in the bill of lading, lost all claim on the consignor; but he failed in establishing that custom, and a verdict was found for the plaintiffs, liberty being reserved to the defendant to move to enter a nonsuit.

F. Pollock, in this term, moved accordingly. The only evidence of any contract to pay freight was the bill of lading signed by the agent of the plaintiffs. By that the plaintiffs undertook to deliver the goods in *London* to the consignees, they paying freight. There was no evidence of any contract by the consignor to pay freight, and the law will not, under these circumstances, imply

1833.

 DOMESTIC
 AGAINST
 BECKFORD.

1833.

—
 DOWETT
 against
 BECKFORD.

one. In *Penrose v. Wilks* (a), *Tapley v. Martens* (b), *Christy v. Rowe* (c), and *Shepard v. De Bernales* (d), there were charterparties, whereby the shipper expressly stipulated to pay the freight; but, in this case, there was no charterparty; and in *Drew v. Bird* (e), where a bill of lading stated that the goods were "shipped by the consignor, to be delivered to the consignee or his assigns, he or they paying freight," Lord *Tenterden* held at nisi prius, that if the goods were delivered without receiving freight, the consignor was not liable for the freight, there being no charterparty.

PARKER J. As soon as these goods (which were the property of the defendant) were shipped in the plaintiffs' ship, to be carried from *Jamaica* to *London*, the defendant, even before any bills of lading were signed, became liable by law to pay freight, unless that liability be controlled by special custom, and of that there is no proof. From the fact, that the goods were laden on a ship to be conveyed from *Jamaica* to *London*, the law will imply a contract by the owner of those goods to pay for the carriage. The only difference between the present case and *Shepard v. De Bernales* (d) is, that in this case a contract to pay freight is implied by law from the fact of the defendant having shipped his goods on board the plaintiffs' ship, to be carried from *Jamaica* to *London*. In the other case, there was an express contract by charterparty; but it was there decided, that the clause in the bill of lading, "*he or they paying freight for the said goods*," was introduced, not for the

(a) *Abbott on Shipping*, 281. (5th edit.) (b) 8 T. R. 451.

(c) 1 Taunt. 300.

(d) 13 East, 565.

(e) 1 Moody & M. 156.

benefit

benefit of the shipper, but for that of the master or shipowner, and was intended to give the latter the option of insisting, if he thought fit, on receiving the freight before he should make delivery of the goods; and that it did not cast the duty on the captain, at his peril, of obtaining the freight from the consignee at the time of delivery; but that if he did not get it from him, he might insist on receiving it from the consignor. I have not the least doubt, that in this case, the defendant, who is the owner of the goods, is liable to pay freight to the plaintiffs.

1838.

DOCKET
against
BANKROAP.

TAUNTON J. concurred.

PATTESON J. *Shepard v. De Bernales* (a) shews that the clause in the bill of lading was introduced for the benefit of the master only, and not for that of the consignor, and consequently the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. In *Christy v. Rowe* (b), the Court of Common Pleas held, that the master was not bound at his peril to insist upon his freight at the time of delivering the goods; but that if he delivered the goods, and could not afterwards get the freight from the consignee, he might sue the merchant on the charterparty.

Rule refused.

(a) 13 East, 565.

(b) 1 Taunt. 300.

.8881
1833.

over the
burial

Nov. 1833
St. Lawrence

The KING against The Inhabitants of Wick
ST. LAWRENCE.

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish; and, therefore, upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may shew by parol evidence that the first order of removal was quashed on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement; and that he afterwards sold the tenement, and thereby became removable.

ON appeal against an order of two justices, made in 1832, for the removal of *Elizabeth* the wife of *Isaac Harle* (who had lately left the parish of *Banwell*), and the children of the said *Isaac Harle* and *Elizabeth* his wife, from the parish of *Banwell* to the parish of *Wick St. Lawrence*, in the county of *Somerset*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

It was proved that the paupers were, in 1822, removed by an order from the respondent to the appellant parish; against which order there was an appeal to the *Easter* sessions in that year; and that the respondents having discovered before those sessions that the paupers were irremovable, by reason of their residing on a tenement purchased by the pauper *Isaac* for less than 30*l.*, determined to abandon their order of removal; that the reason was communicated by the then attorney of the respondents to the then attorney of the appellants, but no mention of the same was made to the Court; and at the said sessions an order was made by the consent of all parties for quashing the said order of removal, in which order of sessions no mention was made of the ground on which the same was quashed. The Court (on the hearing of the present appeal), thinking themselves bound to admit the evidence above stated, overruled an objection to it made by the counsel for the

appellants;

appellants; and upon proof that the pauper *Isaac* did, before the order of removal now appealed against, sell the tenement which rendered him irremovable, and that he had before 1822 obtained a legal settlement in the appellant parish, the Court confirmed the last order of removal. If the Court of King's Bench should think that the court of quarter sessions improperly admitted such evidence, and that the order of sessions in 1822 was, as between the present parties, conclusive of the pauper's settlement at that time, the order now appealed against was to be quashed.

Erle and *Moody* in support of the order of sessions. The order of sessions in 1822 was not conclusive evidence that the pauper at the time of the order of removal then appealed against, was not settled in the appellant parish; and parol evidence was admissible to explain the ground upon which the judgment of the court of quarter sessions proceeded. The general rule is, that the judgment of a court of competent jurisdiction *directly on the point* is, as evidence, conclusive between the same parties upon the same matter directly in question, *Duchess of Kingston's case* (a); and that on the principle that no matter once litigated and determined by proper authority shall a second time be brought into controversy between the same parties. The order of sessions therefore, made in 1822, was conclusive between the contending parishes only as to the point thereby decided. Now, by that order, the Court only decided that the appellant parish was not bound to receive the pauper when the order of removal was made; and that may have been

(a) 20 *Howell's St. Tr.* 538. (note).

1838.

The King

against

The Inhabit-

ants of

Wick

St. LAWRENCE.

1893.

The King
against
The Inhabit-
ants of
Wick
St. LAWRENCE.

either because the party was not chargeable or was irremovable, or because the order was defective for want of form, or because he was not settled in the parish. *Rex v. Saint Andrew's Holborn* (a) shews that if it had appeared on the face of the proceedings that the order of removal had been quashed for want of form, it would not have been evidence that, at the time when it was made, the pauper's settlement was not in the parish to which he was directed to be removed. In *Osgathorpe v. Diseworth* (b), a pauper was removed by an order of two justices from *Diseworth* to *Osgathorpe*, and the order on appeal was quashed. He was, by a second order, sent from *Diseworth* to *Osgathorpe* as a certificate man, and upon appeal it was stated that the first removal was *before he became chargeable*, and the second *after* he became so; and the sessions were of opinion that the first determination was not final between the parties, and therefore confirmed the second order of removal; and on motion to quash the two last orders, on the ground that the first judgment of the court of sessions was final between the parties, this Court held it was not final, and that, because it appeared by evidence that it proceeded on the ground that the pauper was not removable when the first order was made. The special ground for quashing the first order of removal was not stated on the face of the order of sessions; but was stated (and, it must be presumed, was proved) to the court of quarter sessions upon the trial of the *second* appeal; and if it was competent to the removing parish, in that case, to shew by evidence that the reason for the court of quarter sessions

(a) 6 T. R. 613.

(b) 2 Str. 1256. Burr. S. C. 261.

quashing

quashing the first order of removal, was because the pauper, at the time when it was made, was not chargeable, it must also be competent to the removing parish, in this case, to give evidence that he was irremovable for a temporary cause. *Rex v. Wheelock (a)* is also a direct authority to shew that such evidence is admissible. There, this Court refused a mandamus to the justices at sessions to make a special entry on their proceedings, that an order of removal was quashed for want of proof of chargeability, because the respondent, on the trial of another appeal against another order of removal of the same party, might explain by evidence the particular ground on which the former order was quashed. [*Taunton J.* It would be most inconvenient, and would lead to great expense, if it were competent to parties to give parol evidence to explain the particular ground of the judgment.] That objection would apply in many other cases, where a judgment in a former action does not specify the particular ground on which it proceeded. Where a judgment is pleaded in bar, and the real merits of the action have not been at all enquired into in the former proceeding, issue may be taken on the fact: *Hitchen v. Campbell (b)*. A recovery in one action is no bar of a second, where, on the trial of the first action, no evidence was given in support of the claim on which the second is founded, *Seddon v. Tutop (c)*. If there be a reference of all matters in difference between the parties, and, after an award is made, either party bring an action against the other for a matter in difference which subsisted at the time of the submission, parol evidence may be given to

1838.

—
The King
against
The Inhabit-
ants of
Wick
St. LAWRENCE.

(a) 5 B. & C. 511.

(b) 2 W. Bl. 779. 827. 3 Wils. 304.

(c) 6 T. R. 607.

shew

1888:

~~The King~~
 against
 The Inhabit-
 ants of
 Wick
 Sp. LAWRENCE.

shew that that matter was not brought before the arbitrator, *Golightly v. Jellico* (a). In *Rex v. Denbighshire* (b) an appeal was dismissed, on the ground that it was entered on behalf of one overseer only, and then a second notice was given by two. The second appeal was heard and decided on the merits in favour of the appellants, and this Court refused to disturb that decision. [*Taunton J.* There a new state of facts had intervened.] So it has here; for the pauper had parted with the property which made him irremovable at the time when the first order was made. In 1822 he was in possession of property too small to give him a settlement, but which made him irremovable. This point is adverted to in *Phillips on Evidence*, vol. i. p. 329. (7th edit.), where it is said that it will be competent to the respondents to prove that the judgment in the former appeal, reversing the order of removal of the pauper, was given, not on enquiry into the settlement, but on the preliminary objection that the pauper was not chargeable.

The *Solicitor-General* and *Rogers* contra. A judgment of a court of quarter sessions, confirming an order of removal, being *in rem*, is conclusive, not only as between the contending parishes, but against all the world, that the pauper was, at the time of that order, settled in the parish to which he was removed; but a judgment of a court of quarter sessions, quashing an order of removal, without assigning, on the face of it, any special reason for doing so, is conclusive against the removing parish, that the pauper, at the time when the order was made,

(a) 4 T. R. 147. note (a).

(b) 1 B. & Ad. 616.

was not settled in the parish to which he was removed, and that on the presumption that the order was quashed on the merits, and that the sessions must therefore have adjudged that the pauper was not settled in that parish; nor is parol evidence admissible to shew that the decision proceeded on any other ground. Secondly, if such evidence could in any case be given to explain the ground on which the judgment had proceeded, it cannot be done in the present case, because the order was quashed by consent, and the special ground attempted to be proved was not even stated to the court of quarter sessions. It has been the general understanding of the profession, that an order of sessions, quashing an order of removal, is conclusive between the contending parishes; and on that ground it has been a frequent practice to apply to the court of sessions to make a special entry of the ground on which an order is quashed. In *Rex v. St. Andrew Holborn (a)*, the special ground for quashing the order of removal was stated on the face of the order of sessions. In *Osgathorpe v. Diseworth (b)*, it does not distinctly appear, from the report, whether or not the special ground for quashing the first order of removal was stated on the face of the order of sessions. There the pauper, at the time when the first order was made, must have been removed on the ground that he was likely to become chargeable; but as that was no ground for removing a certificated man, as soon as the certificate was produced, the order must have been quashed; but afterwards he became chargeable, and was removed a second time. [*Patteson J.* Evidence must have been

1838.]

The King
against
The Inhabit-
ants of
Wick
St. Lawrence

(a) 6 T. R. 613.

(b) 2 Str. 1256. Burr. S. C. 261.

given

1833.

—
 The King
 against
 The Inhabit-
 ants of
 Wick
 St. LAWRENCE.

given on the trial of the second appeal to shew that the pauper was a certificate man, though the first order on the face of it was good.] The second order of removal must have been different from the first. The first must have stated that the pauper was likely to become chargeable; the second, that he was actually so. In *Rex v. Wheelock* (a), what is said by Bayley J. is a mere obiter dictum. It was sufficient ground for the decision there, that the sessions had pronounced their judgment, and that this Court is not a court of error from that. In *Mungerhunger v. Warden* (b), two justices removed a pauper from the parish of Warden to the parish of *Mungerhunger*, which appealed, and the order was reversed for a defect of form; but the order was good. Afterwards the parish of *Mungerhunger* sent the pauper back: yet, the order being good, it was held final, and a bar to all subsequent orders. Here it must be taken *primâ facie* that the first order of removal was quashed on the merits, no special ground being stated on the face of the order. [*Parke J.* The parol evidence rebuts the *primâ facie* presumption that the court of quarter sessions adjudicated on the settlement; it shews that no evidence was heard.] That evidence was not admissible. The Court must be understood to have adjudicated only on the facts legitimately brought before them. Assuming that evidence might have been admissible to prove that the order was quashed because the pauper was irremovable, there was no sufficient evidence here to shew that it was not quashed on the merits of the settlement. The only proof was, that the parties consented to its being quashed.

(a) 5 B. & C. 511.

(b) Cited 6 T. R. 614.

DENMAN C. J. The only question submitted to us by the court of quarter sessions is, whether the parol evidence was properly admitted. The justices have drawn their conclusion from the facts proved; and I think it sufficiently appeared that the consent was given in consequence of its having been discovered that the pauper was irremovable. The question, as to the admissibility of the parol evidence, depends on the nature of the point actually decided by the court of quarter sessions when they quashed the first order of removal; for judgments of courts of competent jurisdiction directly on the point are, as evidence, conclusive between the same parties upon the same matter directly in question in another suit. Upon this principle a judgment of the court of sessions confirming an order of removal is conclusive not only against the parish to which the removal is directed to be made, but (being a judgment in rem) against all the world, that the pauper, at the time when that order was made, was settled in the parish to which he was sent; for that is the point which the sessions must have decided when they confirmed the order of removal. An order of sessions, quashing an order of removal, is also conclusive between the contending parishes as to the point decided by it. Then the question is, what that point really is. It is that the parish to which the removal was directed to be made was not bound to receive the pauper. The Court may have come to that decision, either on the ground that the pauper was not settled in the parish to which he was sent; or that he was not chargeable, or was irremovable when the order was made. That being the effect of an order of sessions quashing an order of removal, it seems to follow that if
it

1838.

—
The King
against
The Inhabit-
ants of
Wick
St. LAWRENCE.

1833.
 —
 The King
 against
 The Inhabit-
 ants of
 Wick
 &c. LAWRENCE.

it be offered as evidence to prove that the pauper was not settled in the appellant parish, it may be shewn by parol evidence, that the judgment proceeded upon some other ground. It is said that the sessions ought to have made a special entry of the ground on which they quashed the order of removal, and that there being no such entry, it must be presumed that they decided on the merits; but in *Osgathorpe v. Discworth* (a) there was no such entry on the face of the order, and therefore parol evidence must have been given on the trial of the second appeal to shew that the pauper was a certificated man when the first order of removal was made, and consequently not chargeable. That is an authority expressly in point; and in *Rex v. Wheelock* (b), *Bayley and Holroyd* Js. refused to compel the sessions by mandamus to make a special entry of the cause for which they had quashed an order of removal; and that on the ground that the party had his remedy by giving, on the trial of a second appeal, parol evidence of the distinct ground on which the order of removal was quashed. It is said that admitting parol evidence to explain such an order of sessions, will be inconvenient; but supposing the inconvenience were greater than any I can see in the case, injustice is the greatest of inconveniences, and when an order of removal has been discharged, not on the merits but on other grounds, it would be great injustice if it could be set up as a decision on the merits, by a party who knew that they had not been enquired into.

PARKE J. The only question referred to us by the sessions, is, whether they were right in receiving the

(a) 2 Str. 1256. Burr. S. C. 261.

(b) 5 B. & C. 511.

parol

parol evidence. It is not for us to enquire whether they came to a right conclusion on that evidence, though I have no doubt they did; but the only question now is as to the admissibility of the parol evidence, and I think it would lead to much injustice if it were inadmissible. There are two rules applicable to this subject; one is, that an order of sessions confirming an order of removal is conclusive against all the world; the other is, that an order of sessions quashing an order of removal is conclusive between the contending parishes; but it is conclusive only as to the point which it decides, *i. e.* that at the time when the order of removal was made, the appellant parish was not bound to receive the pauper. It is like an acquittal upon an indictment for not repairing a road, on a plea of not guilty, where the question of liability has not been raised on the record; such acquittal is no evidence that the parish was not liable, because it may have proceeded on a different ground, *viz.* either that the road was not out of repair, or was not a public highway. So an order of sessions, quashing an order of removal, may have proceeded, either on the ground that the pauper was not settled in the appellant parish, or that he was not chargeable, or that he was irremovable. By analogy, therefore, such an order of sessions cannot be conclusive evidence that the pauper was not settled in the appellant parish. I think it would have been better if the Court had held, that it was no evidence at all to prove any of the facts on which the decision may have proceeded, because it does not distinctly shew upon the face of it, on what ground it did proceed. The cases, however, shew that it is *prima facie* evidence that the pauper was not settled in the appellant parish; but it must be competent for the respondents

1838.

—
The King
against
The Inhabit-
ants of
Wick
St. Lawrence.

1883.

**The King
against
The Inhabit-
ants of
Wick
St. LAWRENCE.**

spondents to shew, by parol evidence, that the order of sessions was not made on that particular ground, for otherwise they would be subjected to great injustice. In some of the cases, the special ground for quashing the order of removal has appeared on the face of the order of sessions; in others, it has not. In *Osgathorpe v. Diseworth* (a) the special ground was not stated on the face of the first order of sessions. *Rex v. Wheelock* (b) is a direct authority in favour of our present decision. There the order of removal was quashed, in fact, for want of proof of the chargeability of the person removed; but that ground was not stated on the face of the order of sessions, and this Court refused a mandamus to compel the sessions to state that ground specially in their order, because the respondents might, on the trial of a second appeal, explain by evidence the particular ground on which the former order was quashed. Undoubtedly parties must have a right, either to have the ground stated on the order, or to prove it afterwards by parol evidence. As to *Mungerhunger v. Warden* (c), I doubt whether that is any authority at all; it does not appear to have been decided on the question of settlement. It is a general rule, that the judgment of a court of competent jurisdiction is never final between the parties, except as to the point on which the court has adjudicated. Now, here, the point adjudicated was merely that, at the time when the order of removal was made, the appellant parish was not bound to receive the pauper: and parol evidence was admissible to shew that that was the matter really adjudged.

(a) 2 Str. 1256. Burr. S. C. 261.

(b) 5 B. & C. 511.

(c) 6 T. R. 614.

TAUNTON C. J. I certainly had a strong impression in the first instance, that the decision of the sessions in this case was wrong. In the course of the argument, Mr. Erle has removed the difficulties I entertained. I think this falls directly within the authority of one case cited, and that it is also within the scope of another. I would be the last person to disturb the general rule laid down, that an order of sessions quashing an order of removal is conclusive between the contending parishes, and that an order of sessions confirming such an order is conclusive against all the world. But, then, an order of sessions must operate with reference to the state of things existing at the time when it was made. Parol evidence, therefore, was admissible here to shew the state of things when the first order was made, and explain to what extent it was intended to operate. The argument is, that if the parol evidence be admissible, it appears thereby that the ground for quashing the first order of removal was altogether temporary, inasmuch as the pauper then resided on a tenement which, being his own property, rendered him irremovable, but which was not of a sufficient value to give him a settlement; and, therefore, that the order of removal could not then be supported, it being premature: but that after 1822, a new state of things arose; the pauper sold his tenement, and was no longer irremovable: the right to remove him, which was only suspended, revived, and the sessions, in 1832, might take the new state of things into consideration. I think that view of the case correct. I rely chiefly on the case of *Osgathorpe v. Diseworth (a)*; I do not place so much dependence on *Rex v.*

1833.

The King
against
The Inhabit-
ants of
Wick
St. LAWRENCE.

(a) 2 Str. 1256. Burr. S. C. 261.

1833.

The King
against
The Inhabit-
ants of
Wick
St. LAWRENCE.

Wheelock (a), because there the point now before the Court arose incidentally, and not directly. But I cannot distinguish this case from *Osgathorpe v. Diseworth (b)*. There the pauper, who was a certificated person, was removed before he became chargeable, and a second order of removal having been made, upon appeal the above facts appeared by evidence, (which must have been given to explain the first order of sessions,) and the sessions thought the first determination was not final between the parties, and made their order accordingly. On motion to quash the last two orders, on the ground that a reversal is final between the parties, the Court said: "So it would be if the special matter did not appear: a certificated person cannot be sent back until he is actually a charge: a removal before is premature: the consequence of which only is, that he must be suffered to remain till he does become chargeable, but not to make a premature removal final for ever. The last orders must be confirmed." So in this case, as long as the pauper resided in the parish on his own property, he was irremovable; but as soon as the property ceased to be his, he became removable. If a different rule were to prevail here, the consequence would be to make a premature removal decisive. I think the evidence was properly received, and that this case is not distinguishable from *Osgathorpe v. Diseworth*.

PATTESON J. I think we must assume that the sessions were satisfied that the first order of sessions was made on the ground of the pauper having been irremovable. If they were not so satisfied, they would not have sent

(a) 5 B. & C. 511.

(b) 2 Str. 1256. Burr. S. C. 261.

the case here. It is admitted, that if the special ground for quashing the first order of removal had appeared on the face of the order of sessions, it would not have been conclusive. The question then is, whether the parol evidence was properly received. Now on that point I cannot distinguish this case from *Osgathorpe v. Diseworth (a)*. I think it would be much better if the special ground for quashing an order of removal were always stated on the face of the order of sessions, because it would then be unnecessary to give parol evidence on the trial of the second appeal, which is always attended with great expense: but on the authority of *Osgathorpe v. Diseworth*, I think parol evidence may be given on appeal against a second order, to explain the ground on which the first was quashed. It appears that, in that case, the ground of quashing the first order of removal was not stated in the first order of sessions, but that it was stated to the Court on the trial of the appeal against the second order of removal. *Rex v. Wheelock (b)* is not in point, but I am at a loss to see how the Court could have refused a mandamus, unless they had been of opinion that upon appeal against another order, parol evidence of the circumstances might be received, for otherwise it is clear that the party must have a right to have the special ground appear on the face of the proceedings, and the Court in that case would have interfered to enforce it.

Order of sessions confirmed.

(a) 2 Str. 1256. Burr. S. C. 261.

(b) 5 B. & C. 511.

1833.

—
The King
against
The Inhabit-
ants of
Wick
St. LAWRENCE.

1839.

*Saturday,
Nov. 9th.*

The KING *against* The Inhabitants of ST. MARY
NEWINGTON.

A curate licensed by the bishop at a yearly salary, according to the 57 G. 3. c. 99. resided in the rectory house, which was assigned to him pursuant to the same statute, and was above the value of 10*l.* a year, for more than forty days before the passing of 59 G. 3. c. 50.: Held, that this was a coming to settle within the statute 13 & 14 Car. 2. c. 12., and that a settlement was gained thereby.

ON appeal against an order of two justices, whereby *E. J. Sanders*, his wife, and child, were removed from the parish of *Saint Mary Newington*, in the county of *Surrey*, to the parish of *Saint Mary Islington*, in the county of *Middlesex*, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper's *prima facie* settlement, derived from his father, was admitted to be in the parish of *Islington*, and the question was, whether his father had acquired a subsequent settlement under the following circumstances. In the month of *October* 1818, the pauper's father, the Reverend *J. B. Sanders*, entered into an engagement with the Reverend *J. Mitchell*, the rector of *St. Nicolas Cole Abbey, Old Fish Street, London*, to officiate as curate of that parish; and it was agreed that he should have 80*l.* per annum, and the rectory house to reside in free of rent and taxes; and about that time he commenced his duties as a curate. On the 12th of *December* following, the Reverend *J. Mitchell* nominated and appointed the pauper's father to be curate of the said parish, but the latter did not go to reside at the rectory house until a week after *Christmas* 1818; and on the 2d of *February* 1819 a licence was granted him by the Bishop of *London*, pursuant to the provisions of the statute 57 G. 3. c. 99., to perform the office of stipendiary

stipendiary curate, in reading the common prayer, and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer; and the yearly stipend of 80*l.* was assigned to him, to be paid quarterly, for serving the said cure, with the rectory house, wherein he was directed to reside, and offices, free of rent, repairs, and taxes.

The pauper's father did all the duties of curate from *October* 1818, till his death in the year 1829; and from a week after *Christmas* 1818, till his death, he resided at the rectory house, which was a separate and distinct dwelling-house, worth more than 10*l.* a year, free of rent, repairs, and taxes, and receiving the yearly stipend.

The question for the opinion of the Court was, whether the pauper's father, by occupying the rectory house in the manner stated, gained a settlement in the parish of *Saint Nicolas Cole Abbey, Old Fish Street, London.*

Barneswall in support of the order of sessions. The question is, whether a curate, by residing in a rectory house which is above the annual value of 10*l.*, can be said to have come to settle on a tenement within the meaning of the 13 & 14 *Car. 2. c. 12. s. 1.* The pauper's father went to reside in the rectory house one week after *Christmas* 1818; he therefore resided in it more than forty days before the 2d of *July* 1819, when the 59 *G. 3. c. 50.* passed. Now, the lawful possession of a tenement of sufficient value, when absolute and independent, with some interest therein which is sufficiently permanent to denote a coming to settle according to the words of the 13 & 14 *Car. 2. c. 12. s. 1.*,

1833.

—
The King
against
The Inhabit-
ants of
St. Mary
Newington.

1833.

—
The King
against
The Inhabit-
ants of
St. Mary
Newington.

confers a settlement, although the occupier be exempt from paying rent (a). *Rex v. Lakenheath* (b) is in point. There, the master of a charity school, who was removable from his office at pleasure, resided for seven years, rent free, in a house of the annual value of 10*l.*, where other parish schoolmasters had resided before, and he underlet part of the house to the parish at an annual rent: it was held, that this was a coming to settle upon a tenement of the value of 10*l.* per annum, within the meaning of the 13 & 14 *Car. 2.*, and that the pauper thereby gained a settlement. Here it is perfectly clear that the possession was lawful, and that the curate had a permanent interest independent of the rector. By the 57 *G. 3. c. 99. s. 67.*, the latter could not even dispossess the curate without the order of the bishop, and notice pursuant to that statute. It will be said here, that the curate took no interest except under the bishop's licence, and that the house was assigned to him for the more convenient performance of the duties of his office. Now, if the curate had resided merely in virtue of the agreement with the rector, his possession would have been lawful, and the house, being of the required value of 10*l.* a year, would have given him a settlement; for, till the licence was obtained, he had an interest as yearly tenant, defensible on the bishop's refusing to grant a licence. That being afterwards granted, the interest derived from the agreement with the rector continued, though it was subject to the contingency of the bishop revoking the licence, or ordering him to deliver up possession.

(a) 2 *Nolan's Poor Law*, 4.(b) 1 *B. & C.* 531.

Thesiger and *Tidd Pratt* contra. In *Rex v. Wantage* (a), the curate, who resided in a rectory house for six years, was held not to gain a settlement by serving an office, and it was not even contended that he gained a settlement by renting a tenement. [*Denman* C. J. It does not appear there that the house was of the annual value of 10*l*.] In all probability it much exceeded that value. But here the pauper's father did not reside in the rectory house in the character of tenant, but in that of curate, the house having been assigned to him by the bishop for the more convenient performance of the duties of curate, in pursuance of the 57 G. 3. c. 99. By section 64., the bishop may, where the rector is not resident, allot, for the residence of the curate, the parsonage house during the time of the curate's serving the cure; by section 66., the bishop may, upon three months' notice in writing, direct the curate to give up possession; and by section 32., all contracts for letting houses of residence belonging to any benefice, in which houses of residence any spiritual person shall, by order of the bishop, be required to reside, or which shall be assigned or appointed as a residence to any curate by the bishop, are rendered null and void. The pauper's father could acquire no interest in the parsonage by his agreement with the rector, independently of the bishop's licence; and by that the parsonage house is assigned for the convenient performance of the duties of the living, and upon certain conditions. The curate is to give up possession on three months' notice from the bishop; and the rector cannot dispossess him without an order from the bishop. This is distinguishable from

1833.

The King
against
The Inhabit-
ants of
St Mary
Newington.

(a) 2 *East*, 65.

1883.

The King
against
The Inhabit-
ants of
St. Mary
Newington.

Rex v. Lakenheath (a), where great stress was laid on the circumstance that the party had underlet. Here the curate could not underlet. Several authorities shew that if a tenement be assigned to a yearly servant for the more convenient performance of his service, and not in the character of tenant, no settlement is gained by the occupation of it. *Rex v. Minster (b)*, *Rex v. Kelstern (c)*, and *Rex v. Cheshunt (d)*. [Taunton J. There are cases where a settlement may be gained by a party though he is not tenant, as where a party comes under an agreement to purchase.] There, there would be a tenancy at will. [Parke J. In the cases cited, the occupation was considered the occupation of the master. Here the residence of the curate was not the residence of the rector; he had an interest of his own independent of that of the rector.] Then it must be contended that he is in by estate, not by coming to settle on a tenement.

DENMAN C. J. The kind of settlement relied upon in this case has grown out of the 13 & 14 Car. 2. c. 12. s. 1., which confines the power of removal to cases where persons come to settle on any tenement under the yearly value of 10*l.*, and by implication has been held to confer a settlement on a person who comes to settle on a tenement of that value; and the lawful occupation of a tenement of that annual value by a party in his own right, has been held to satisfy the words *coming to settle*. The word "renting" is not to be found in the statute. It is true that this settlement is most generally considered to be acquired by renting, because the

(a) 1 B. & C. 531.

(b) 3 M. & S. 276.

(c) 5 M. & S. 136.

(d) 1 B. & A. 473.

renting

renting shews the occupation to be independent and for the convenience of the occupier, and not for that of the landlord; and on this principle, many of the cases, where a distinction has been taken between an occupation as tenant, and an occupation as servant, proceed: the statute, however, does not require that there should be an occupation as tenant, but a mere coming to settle; and here I think it quite clear that the pauper's father came to settle in the parish of *St. Nicolas Cole Abbey*.

PARKE J. It is not clear that the curate is not tenant to the rector; but it is not necessary for the purpose of gaining a settlement that he should be so. It is sufficient if he comes to occupy as having an interest of his own, and not as servant to another.

TAUNTON J. The statute 9 & 10 W. 3. c. 11. which makes the *taking a lease* of a tenement of the value of 10*l.* per annum confer a settlement, is confined to persons residing under a certificate. To satisfy that statute, there must undoubtedly be a contract for renting; but this is a case within the 13 & 14 Car. 2. c. 12. s. 1., which has been held to give a settlement to any person coming to settle on a tenement of the yearly value of 10*l.* The case of occupation is usually founded on the renting of a tenement of 10*l.* a year, yet it is not necessary that it should be under a renting, or in the character of tenant. Here the pauper's father had a lawful possession of a tenement of the required value, and an interest therein sufficiently permanent to denote a coming to settle; and that is sufficient to satisfy the 13 & 14 Car. 2., even though the occupier is exempt from

1833.

The King
against
The Inhabit-
ants of
St. Mary
Newington.

1833.

The KING
against
The Inhabit-
ants of
St. MARY
NEWINGTON.

from payment of rent, or has not the character of tenant. The case comes within the doctrine of the passage cited in the argument from Mr. *Nolan's Poor Law*, which, though not strictly authority, is entitled to respect.

PATTESON J. There was clearly a coming to settle by the pauper's father, unless the occupation of the curate is in all cases to be considered the occupation of the rector: which it clearly is not. I do not see any analogy between this case and the cases of master and servant referred to in the argument.

Order of sessions confirmed.

Saturday,
Nov. 9th.

The KING *against* The Inhabitants of STOCKTON.

Two justices ordered *F. C.*, the wife of *R. C.*, a Scotchman, having no settlement in England, and a lunatic, to be removed from parish *A.*, where she had become chargeable, to parish *B.*, which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made: Held, that the order was not void on the ground that it would effect the separation

of husband and wife, because it was not to be presumed that when it was made, the husband was residing in parish *A.*, or was not residing in parish *B.*

ON appeal against an order of two justices, whereby *Frances Carstofen*, and her three children, were removed from the township of *Stockton*, in the county of *Durham*, to the parish of *Spalding*, in the county of *Lincoln*, the sessions reversed the order, subject to the opinion of this Court on the following case: —

On the 2d of May 1832, *Robert Carstofen*, who is a native of *Scotland*, without settlement in *England*, and a lunatic, returned from *Sunderland*, in *Durham*, where he had for some time been residing, to *Stockton*, accompanied by his wife and her three children. Almost immediately on their arrival in that township, they applied to the assistant overseer for relief; and on the 2d and 3d of that month were relieved by him, and

ordered

ordered to quit the town and return to *Sunderland*. About the 19th of *May*, the wife again applied to the *Stockton* overseers for relief, whereupon she and her three children were removed to the parish of *Spalding* by an order of justices, which stated that, upon complaint "that *Frances Carstofen*, the wife of *Robert Carstofen*, a *Scotchman*, having no settlement in *England*, and who is a lunatic, and her three children (therein described), had come to inhabit in *Stockton*, not having gained a settlement there, nor producing any certificate owning them to be settled elsewhere, and that they had become chargeable to the said township of *Stockton*," they, the said justices, upon due proof, did adjudge the same to be true, and likewise adjudged "that the lawful settlement of her, the said *Frances Carstofen*, and her three children, is in the parish of *Spalding*;" they therefore required the churchwardens and overseers of *Stockton* to convey her and her three children from *Stockton* to *Spalding*.

The parish of *Spalding* appealed against this order; and to bring the question before the Court, the following admissions were made:—That the maiden settlement of *F. C.* is in the parish of *Spalding*, and that she was legally married to *Robert Carstofen*, and that the three children named in the said order are legitimate; that the said *R. C.* was born in *Scotland*; that he has not gained any settlement in *England*; and that he was a lunatic, and living, at the date of the order of removal.

On the hearing, an objection was taken to the form of the order, and the court of quarter sessions quashed the same, on the ground that it was bad on the face of it, as it did not contain any statement of the desertion of the wife by the husband; that the defect was in a matter

1833.

—
The King
against
The Inhabit-
ants of
Stockton.

1833.

The King
against
The Inhabit-
ants of
Stockton.

matter of substance which the court had not power to remedy, and that evidence could not be received for the purpose of amending the order. The township of *Stockton* tendered evidence for this purpose, and offered to shew that the husband was not living with his wife, nor in the township of *Stockton*, at the time of the wife's application for relief and the order of removal being made, but that he had escaped from his family in a fit of lunacy on the preceding 4th of *May*, when they were all in the parish of *Thirsk*, in *Yorkshire*.

If this Court should be of opinion that the order was bad in the face of it, and not amendable, the order of sessions was to be confirmed; otherwise to be quashed.

Ingham in support of the order of sessions. This order is bad on the face of it, and the defect was in matter of substance; the court of quarter sessions could not therefore amend it; *Rex v. Great Bedwin (a)*; nor receive evidence for that purpose. Justices have no power of separating husband and wife by removal, unless the parties consent, as in *Rex v. Eltham (b)*, or the husband has deserted the wife, as in *Rex v. Cottingham (c)*. It ought, therefore, to have appeared on the order, or by necessary inference from it, either that no separation will be effected by the wife's removal, or that it is a case of consent or desertion by the husband. In *Rex v. Ironacton (d)*, the removal was to a parish stated in the order to be the last legal settlement of the husband; and in *Rex v. Higher Walton (e)*, the re-

(a) *Burr. S. C.* 163.(c) 7 *B. & C.* 615.(e) *Burr. S. C.* 162.(b) 5 *East*, 113.(d) *Burr. S. C.* 153.

moval was made to the place of the wife's last legal settlement; and the Court said, it must be intended that that was the husband's settlement; and *Rex v. Hinaworth (a)* is to the same effect. Now here it cannot be intended that *Spalding* is the husband's settlement, because it is stated expressly on the face of the order that he was a *Scotchman*, and had no settlement. Nor can it be said that he may follow her there; for, by 59 G. 3. c. 12. s. 33., he must be passed to *Scotland*. A consent by him, if stated, would be invalid since the statute: *Rex v. Leeds (b)*.

1833.

The King
against
The Inhabit-
ants of
StOCKTON.

S. Temple contra. The Court will not presume any thing which will have the effect of vitiating the order of removal; and to render it void, they must presume, either that when it was made, the husband of the pauper was not at *Spalding*, or that the husband and wife were then living together. In *St. Michael Bath v. Nunny (c)*, the order of removal being to the former parish, it was moved to quash it, because it did not appear that the husband was in that parish; but the Court said, they would not intend he was not there, and that if he were in the parish from which she was sent, that would vitiate the order; but as neither of these facts appeared, to satisfy them that the order was bad, they would not presume it to be so. So in *Rex v. Ironacton (d)*, the removal of the wife being to that parish, and the sessions having confirmed the order, on motion to quash both orders, on the ground that the wife was removed without the husband, and that that amounted to a divorce between the man and his wife; the Court said, that it

(a) *Doug.* 46. n. (13). *Cald.* 42.

(b) 4 B. & A. 498.

(c) 1 Str. 544. *Burr. S. C.* 815.(d) *Burr. S. C.* 153.

did

1833.

The King
against
The Inhabit-
ants of
Stockton.

did not appear that the husband was not at *Ironacton* at that time; and in *Rex v. Higher Walton (a)*, the removal of the wife being to that parish, which was adjudged to be the place of her last legal settlement, and the sessions having confirmed the order of removal, on motion to quash those orders on the ground that it did not appear whether the woman's settlement was in her own right, or in right of the husband, and that nothing ought to be intended, the Court said that she could not be settled but where her husband was, and that they could not intend any thing to vitiate the order.

DENMAN C. J. The authorities cited shew that the Court will not presume any fact in order to vitiate an order of removal. Here it is perfectly consistent with that order, that it may not have the effect of separating husband and wife; for the husband and wife may not have been living together at the time when that order was made, or he may be living at *Spalding*, the parish to which she is ordered to be removed.

PARKE J. This case falls within *St. Michael Bath v. Nunny (b)*. We cannot intend that when the order was made, the husband of the pauper was residing at *Stockton*, or that he was not at *Spalding*.

TAUNTON and PATTESON Js. concurred.

Order of sessions quashed.

(a) *Burr. S. C.* 162.

(b) 1 *Str.* 544. *Burr. S. C.* 815.

1833.
—The KING *against* JAMES DAVIS and Another. *Saturday, Nov. 9th.*

THE following order of justices having been confirmed on appeal to the *Gloucester* sessions, and afterwards removed by certiorari into this Court, a rule nisi had been obtained for quashing it, on the ground, first, that the informer was not named in it; secondly and thirdly, that it did not appear that *Gyde*, therein named, was landlord, or *James Davis* tenant: —

Whereas *James Davis*, of the parish of *Cheltenham*, in the county of *Gloucester*, fishmonger, on, &c., at, &c., upon a complaint in writing duly made and exhibited before *R. B. C.* and *T. N.*, two of his Majesty's justices of peace for the said county, residing near the place whence the goods and chattels hereinafter mentioned were removed, and not being interested in the premises whence the same were removed, was charged with having fraudulently and clandestinely removed and conveyed away his goods and chattels, not exceeding the value of 50*l.*, from certain premises at *Cheltenham*, to prevent *William Gyde* from distraining the said goods and chattels for arrears of rent due to the said *W. Gyde* for the said premises: and whereas *John Davis*, of, &c., baker, was, on, &c., at, &c. upon the said complaint duly made, charged before the said *R. B. C.* and *T. N.*, with having wilfully and knowingly aided and assisted the said *James Davis* in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same: and the said *R. B. C.* and *T. N.* as

An order of justices, under 11 G. 2. c. 19. s. 4., adjudging a party to pay double the value of good fraudulently and clandestinely removed to prevent a distress, must shew on the face of it that the party removing the goods was tenant: and that is not sufficiently shewn by stating that, on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent *A. B.* from distraining them for arrears of rent due to him for the said premises: and that, it appearing that he did so remove, &c., he is convicted thereof.

Seemle also, that the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord.

such

1833.

The King
against
DAVIS.

such justices, having summoned the parties concerned, and we, &c. (three justices for the county), having heard the said charge and examined the fact and all proper witnesses upon oath, and it appearing and being fully proved before us that the said *James Davis* did so fraudulently and clandestinely remove and convey away the said goods and chattels as aforesaid, being of the value, &c.; and that the said *John Davis* wilfully and knowingly aided and assisted the said *James Davis* in so removing and conveying away the said goods and chattels as aforesaid, and in concealing the same: we, &c., do therefore, this 22d day of *May* in the year aforesaid, at, &c., determine and adjudge that the said *James Davis* and *John Davis* are guilty of the offences with which they are charged as aforesaid, and that they are hereby convicted thereof; and we do hereby adjudge them to pay the sum of 34*l.*, being double the value of the said goods and chattels, to the said *W. Gyde* forthwith. (a)

Sir

(a) The 11 G. 2. c. 19. ss. 1. and 2. enacts, that in case any tenant, lessee for life or years, &c. of any lands, &c., upon the demise or holding whereof any rent is or shall be reserved, due or made payable, shall fraudulently or clandestinely carry off from such premises his goods, to prevent the landlord or lessor from distraining the same for arrears of the rent so reserved, &c., it shall be lawful for the landlord to distrain the goods within thirty days, wherever found, unless sold to any person not privy to the fraud.

Section 3. enacts, that if any such tenant shall fraudulently remove or convey away his goods as aforesaid, or if any person shall aid or assist any such tenant or lessee in such fraudulent conveying away, &c. such person shall forfeit and pay to the landlord or lessor, from whose estate such goods were carried, double the value of the goods, to be recovered by action of debt.

Section 4. provides, that where the goods so fraudulently carried off shall not exceed the value of 50*l.* it shall be lawful for the landlord, his bailiff, servant, or agent, to exhibit a complaint in writing against such offender before two or more justices, &c. residing near the place, not being interested in the lands, &c. who may summon the parties concerned,

Sir *J. Scarlett* and *Justice* now shewed cause. First, the order pursues the form in *Burn's Justice*, 24th edit., title, *Distress*, which *Bayley J.*, in *Rex v. Rabbitts* (a), stated to be unobjectionable. It states that upon complaint duly made, the parties were charged. The complaint could not be *duly* made but by the landlord or his agent. As to the second and third objections, the order shews that *James Davis* removed his goods to prevent *Gyde* from distraining them for rent due to *Gyde* for the said premises. [*Parke J.* It is not stated that *Gyde* was the landlord of *James Davis*. In *Rex v. Rabbitts*, the removal was alleged to be to prevent *A. B.*, being the landlord of *Rabbitts*, from distraining. Here, for any thing that appears in the order, the complaint may have been by any person unconnected with the landlord.] The Court will not intend any thing against the order, but rather the contrary. *Rex v. Bissex* (b); and *Rex v. Monk*, there cited. As the order alleges the removal to have been with intent to prevent *Gyde* from distraining for arrears of rent of the said premises, the fair inference is that the rent was due from *James Davis* as tenant to *Gyde* as landlord; and if that be so, then the order does sufficiently shew that the one was landlord and the other tenant.

1833.

The King
against
Davis.

cerned, examine the fact, and all proper witnesses upon oath, and in a summary way determine whether such person or persons be guilty of the offence; and to enquire, in like manner, of the value of the goods and chattels carried off; and upon full proof of the offence, the said justices, by order, may adjudge the offender to pay double the value of the said goods to such landlord, his bailiff, &c. at such time as the said justices shall appoint.

(a) 6 D. & R. 341.

(b) 1 Chetwynd's Burn, 24th edit. 876. 1 Chitty's Burn, 985. n. (a). Sayer's Rep. 304.

1833.

The King
against
DAVIS.

[*Taunton J.* The justices must state on the face of the order sufficient to shew that they had jurisdiction to make it.]

Thesiger, contra, was stopped by the Court.

DENMAN C. J. As to the objection that the order does not state the name of the complainant, it is, perhaps, a sufficient answer that it does allege that, on complaint duly made, *James Davis* was charged. But it is perfectly consistent with every thing stated in the order, that *Gyde* was not landlord, and that *Davis* was not tenant. This objection did not occur in *Rex v. Bissax (a)*. There the order recited a complaint stating that *Clavey* demised his estate to *Thatcher*, and that complaint was adjudged to be true. The same distinction applies to *Rex v. Rabbitts (b)*. In this case, if *Gyde* was not landlord, nor *James Davis* tenant, the magistrates had no jurisdiction to make the order.

PARKE J. It is not shewn here that *James Davis* was tenant. Now, justices have no summary jurisdiction, except over tenants who fraudulently remove or conceal their goods, and those who assist them in so doing; they have a special authority given to them, on the complaint of the landlord, where the goods removed or concealed do not exceed the value of 50*l.*, in a summary way to determine as to the offence, and to adjudge the offender to pay double the value. If, then, it does

(a) 1 *Chetwynd's Burn*, 24th edit. 876. 1 *Chitty's Burn*, 985. n. (a).
Sayer's Rep. 304.

(b) 6 *D. & R.* 341.

not appear by this order that *James Davis* was the tenant, it is not shewn that the justices had jurisdiction.

1833.

The King
against
DAVIS.

TAUNTON J. concurred.

PATTESON J. I do not think it appears that *James Davis* was the tenant; but I should not wish it to go forth that the second objection is not tenable, for it does not follow, because rent was due to *Gyde*, that he was the landlord, to whom rent was reserved on the demise of the premises; he might be the superior landlord, or he might have a rent charge.

Rule absolute.

The KING *against* WILLIAM GREGORY.

Saturday,
Nov. 9th.

INDICTMENT charging the defendant with a nuisance, by unlawfully continuing a certain erection or building by the side of a certain road leading from the south end of *Blackfriars Bridge* to the *Obelisk* in *St. George's Fields*, and thence along the *London Road* to *Newington*, the said building being within ten feet of the said road, and being contrary to the provisions of an act of parliament of 3 G. 4. c. cxii. Plea, not guilty. At the trial before *Tindal C. J.*, at the Spring assizes for the county of *Surrey* 1833, a verdict for the

An act of parliament prohibited the erection or continuance of any building within ten feet of the road, and declared that the footpaths should be subject to the act, and be part of the road. It further enacted, that if any such building should be erected or continued con-

trary to the act, it should be deemed a common nuisance. By another clause, two magistrates were empowered to convict the proprietor and occupier of such building, and to make an order for the removal thereof:

Held, that notwithstanding the latter clause, the party who erected or continued a building contrary to the act might be indicted for a nuisance.

Held also, that an open shop, having its front built on the foundation of an old wall immediately adjoining the footpath, and connected by a roof with the front of a house which was more than ten feet from the road, was a building within the meaning of the act.

1833.

—
The King
against
Gaseory.

crown was taken by consent, subject to the opinion of this Court on the following case : —

The road in question is one of the roads in the county of *Surrey*, which are under the superintendence and control of “ The trustees of the *Surrey* new roads.” It was made and set out under the provisions of an act passed in the 9 G. 3. (c. 89.), and, including the footpaths, is of the width of sixty feet, the centre or carriage way being forty feet wide, and the footways on each side ten feet. By the statute 26 G. 3. c. 131. s. 34., (passed in the year 1784,) certain distances are prescribed, within which the erection of buildings is prohibited : these distances vary in respect of different parts of the roads ; and as to the road where the alleged nuisance is situated, it is enacted, “ that no building shall be erected by any proprietor or occupier of the lands adjacent to such part of the said roads as lies between the south end of *Blackfriars Bridge* and *Newington*, and from the *Circus* to the *Dog and Duck*, within ten feet on either side of the said roads ; and if any such building shall hereafter be erected contrary to the true intent and meaning of this act, the same shall be deemed a common nuisance.” By the act 3 G. 4. c. cxii. s. 126., (which passed in 1822,) the several distances, within which buildings are prohibited by the 26 G. 3. are recited ; and it is there enacted, “ that no erection or building shall be erected, built, or continued by any such proprietor or occupier of lands adjacent to the said roads or any of them, within the distances aforesaid or any of them ; and that if any such erection or building shall hereafter be erected, built, or continued contrary to the true intent and meaning of this act, the same shall be deemed a common nuisance.” By sect. 128. of the same statute, it is further enacted,

enacted, "that for the more speedy conviction of any such proprietor or occupier, and the removal of any such building, it shall be lawful for two justices of the peace to summon before them such proprietor and occupier, and upon proof by oath of two credible witnesses, or by confession of the party, of any such erection or building having been so built or continued contrary to the true intent and meaning of the said act, to convict such persons so offending, and make such order for the removal of such erection or building, as to such justices shall seem proper." The statute then gives a right of appeal to the quarter sessions, whose decision is to be final and conclusive to all intents and purposes whatsoever. And it also provides, "that no order, verdict, assessment, judgment, or other proceeding, made touching or concerning any of the matters aforesaid, or touching the conviction of any offence against this act, shall be removed or removable by certiorari, or any other writ or process whatsoever, into any of his Majesty's courts of record at *Westminster*."

The indictment was preferred by the trustees appointed by virtue of the above mentioned acts of parliament. The alleged nuisance is situated on land, on part of which, in 1791, a chapel was erected, and the remainder of which was enclosed for a burial-ground, by a high brick wall which immediately adjoined the footpath. The chapel itself was built several feet within this enclosure, and the space between the front of the chapel and the footpath was occupied by a portico and flight of steps leading to the chapel, the foot of the steps being in a line with the brick wall by which the burial-ground was enclosed. There was also, under the steps, an entrance from the footpaths

1833.

The King
against
GREGORY.

1893.

The King
against
GREGORY.

to vaults under the chapel, and there was a door in the brick wall, opening from the footpath into the burial-ground. In that state the property continued from 1791 to 1890, when it passed into the hands of the present proprietor, who erected two new houses on part of the burial-ground, the fronts of which houses ranged with the front of the chapel. To one of these houses the defendant made an addition, which is the nuisance complained of. The brick wall has been pulled down to a level with the ground, and on the same foundation an open shop-front has been placed, and a roof added, which connects the shop-front with the front of the newly built house. The shop thus formed is not higher than the brick wall was, nor does it project beyond the line upon which the brick wall formerly stood, and upon which the portico and steps of the chapel always have been and still are. The footpath itself is of the uniform width of ten feet, and that space is now left clear between the front of the shop and the carriage road. Soon after the above alteration was made, the trustees of the roads complained of it as an infringement of the act of 3 G. 4., and applied to two justices to abate it as a nuisance, under the provisions of that statute; but the justices declined to do so, and the trustees subsequently preferred the present indictment, and removed it by certiorari into this Court.

The questions for the opinion of the Court were:
1st, Whether, under the circumstances above stated, the trustees could legally prefer the present indictment, and remove it into this Court?

2dly, Whether the alteration made in the property as above described, constituted a building within the meaning of the above-mentioned statutes?

3dly,

3dly, Whether, if it were a building within the meaning of those statutes, it were or were not within the distance from the road prescribed by the statutes ?

1853.

The King
against
GREGORY.

Thesiger for the crown. First, the erection complained of constitutes a building, for it is a fabric erected upon a foundation, and has a roof. 2dly. It is a building erected within the distance prohibited by the legislature. The road was made pursuant to the provisions of 9 G. 3. c. 89., which direct that it shall be sixty feet wide, and that no building shall be erected by any proprietor or occupier of lands abutting upon or adjacent to the road, within the distance of ten feet from the said road, and that if any building shall be erected within ten feet, the same shall be deemed a common nuisance. That act says nothing as to the relative width of the carriage road or foot road, but the *road*, including both carriageway and footway, was to be sixty feet wide; and it appears by the statement that the road, including both, was made of that width. The legislature manifestly intended that the space free from building should be eighty feet. The provision against building within the prohibited distance is repeated in the 26 G. 3. c. 131. s. 34. There can be no doubt that under these acts the footpaths were to be deemed part of the road; but the 116th section of the 3 G. 4. c. cxii. from abundant caution, enacts, that the footpaths adjoining to the roads shall be deemed part of the road to be repaired by the trustees. Then sect. 126. provides that no erection or building shall be erected, built, or continued within certain distances. If the portico and steps, with the wall, had remained as they were before the alteration, it might have been contended they could

1833.

—
The King
against
GREGORY.

not be continued; but it is unnecessary so to argue here, because an entirely new building has been erected within the prohibited distance. The object of the legislature was twofold, to establish a uniform line of building, and to prevent encroachments on the road.

Then, as to the mode of proceeding, it will be said, that inasmuch as before the passing of these acts it was not an offence to build within the prescribed limits, and as by 3 G. 4. c. 112. s. 128. a summary proceeding before magistrates is given, an offender against the act cannot be prosecuted by indictment. But these acts make an erection within the prescribed distance a common nuisance; and then it falls within the rule laid down by *Denison J.* in *Rex v. Wright (a)*, "that where an offence is not so at common law, but made an offence by act of parliament, yet an indictment will lie where there is a substantive prohibitory clause in such act of parliament, although there be afterwards a particular provision, and a particular remedy given; but it is otherwise where the act is not prohibitory but only inflicts the forfeiture and specifies the remedy." The same rule is laid down by *Ashhurst J.* in *Rex v. Harris (b)*, and is supported by the authorities referred to in Mr. Serjeant *Williams's* note to *Rex v. Dickenson*, 1 *Saund.* 135. *b.*

Bodkin contrà. If the shop in question be indictable as a nuisance, the portico and steps, which have been erected more than forty years, are equally so. They, however, are not per se a building, but additions to the other building, and the shop also is a mere addition,

(a) 1 *Burr.* 545.(b) 4 *T. R.* 205.

and

and the case terms it so. The circumstance of its being connected with the adjoining house by a roof makes no difference. The portico might have been enclosed; and the wall, or even an iron railing, might be connected with an adjoining building by a roof. [Denman C. J. According to your argument, if there were a wall at the extremity of a man's garden, he might build a house up to it.] If the act were literally construed, a man could not enclose his own land by building a wall at the extremity. [Parke J. A wall would not be a building within the meaning of the act; that was so held in a case from *Yorkshire*, which arose on an enclosure act.] Then, as to the second point, it is true the 9 G. 3. c. 89. directs the road to be made sixty feet wide, and a space of sixty feet was set out accordingly; but in 1822, when the 3 G. 4. c. cxii. passed, the state of things was different. The carriage road had been made forty feet wide. The footpath was the same in width as the prohibited distance, viz., ten feet; and the legislature must have regarded the state of things at that time. The word *road* is used in its popular sense, and was intended to prohibit building within ten feet of the carriage road. The 116th section of the 3 G. 4. c. cxii. enacts that "the footpaths on the sides of or adjoining to the said roads by the act authorised to be repaired, shall be, and they are thereby declared to be, subject to the regulations of that act, and to be part of the said roads, and shall be repaired and amended by the said trustees *by such ways and means and in such manner as the said roads* are and shall be repaired and amended." The footpaths, therefore, are distinct from the roads; they

are

1833.

The King
against
Garnsey.

1833.

—
The King
against
GREGORY.

are not the same for all intents and purposes (a). The act imposes a penalty on persons riding on the footpath, which shews that the footpath and the road are not the same. The 110th section provides that the surveyors may remove all annoyances on any part of the roads, or on the sides thereof. Section 111. authorises the trustees to give the owners or occupiers of houses, &c. on the sides of the said roads, notice to remove signs, bow-windows, show-boards, &c. projecting over any part of the said *footpaths*, or sides of the said roads, and all other annoyances whatsoever on the said footpaths or sides of the said roads; and authorises the trustees to remove them, if the owners will not. This latter clause is quite inconsistent with the supposition that the legislature intended that there should be ten clear feet between the houses and the footpath. Then as to the mode of proceeding. This case falls within the rule laid down by Lord *Mansfield* in *Rex v. Wright* (b), viz., that “Where newly-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie: but where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued. For otherwise the defendant would be liable to a double prosecution: one upon the general prohibition, and the other upon the particular specific remedy.”

DENMAN C. J. I have not the least doubt in this case. The acts expressly say that there shall be a road sixty feet

(a) As to footpaths being part of the road, generally, see *Loweridge v. Hodsell*, 2 B. & Ad. 602., judgments of *Parke* and *Taunton J.*

(b) 1 Burr. 544.

wide,

wide, and that no building shall be erected within ten feet of that road. The erection in question is clearly a building within the acts, and it is within the prohibited distance. As to the proceeding by indictment, it is true that the act of 3 G. 4. gives a summary proceeding before magistrates, but it also declares that the erection of a building within the prohibited distance shall be deemed a common nuisance, and every common nuisance is an indictable offence.

1833.

The King
against
GARGORY.

PARKE J. This is a very plain case. The shop in question is clearly a building within the meaning of the acts of parliament. The legislature did not intend to distinguish between a building and an *addition* to a building. It is also a building erected within the prohibited distance. The acts require the road to be sixty feet wide, and that no building shall be erected within ten feet of the road; it is therefore required that there should be eighty feet free from building. Here, if the shop be continued, there will be but sixty feet. The only clause which created the least doubt in my mind was the 111th, which authorises the trustees to take down signs and bow-windows, projecting over any of the footpaths or sides of the said roads. That, however, may have been intended to meet every kind of annoyance, and to give a cumulative remedy by the summary removal of the encroachments there mentioned. At all events, it does not raise any uncertainty as to the meaning of the previous sections.

TAUNTON J. I am of opinion that the shop is a building within the acts. The second question is, whether it is within the prohibited distance. Now, the 9 G. 3.
c. 89.

1833.

**The King
against
Gazebury.**

c. 89. directs that the road shall be sixty feet wide. It does not say how much of this sixty feet shall be used as a carriage road, and how much as a foot road; but it provides, that no building shall be erected within ten feet of the said road. Then any building erected within ten feet of this road (sixty feet wide), would be within the prohibited distance. This sixty feet of road was afterwards divided into a carriage road of forty feet, and foot roads on each side, of ten feet each. That was the state of things when the 3 G. 4. c. cxii. provided that the footpaths should be deemed part of the road. The whole, therefore, is one road, whether it be used by carriages or foot passengers; and this building is within ten feet of that road, and therefore within the prohibited distance. Then it is argued, that by the 111th section of the 3 G. 4., a special power is given to the trustees to remove projections over the footpaths, and that the footpaths are therefore distinguished from the roads; and, consequently, that a building may be erected within ten feet of the footpaths. Now, this may have been intended as a cumulative provision, but at any rate it is not necessarily to be implied from the introduction of this clause, that the ten feet mentioned in the previous clauses are not to be reckoned from the road, the footpaths being included in that term. To the objection, that this is not an indictable offence because a particular remedy is pointed out, the answer is, that the statute declares it to be a common nuisance, and as such it is indictable.

PATTESON J. concurred.

Judgment for the crown.

1833.

The KING against W. MORTON PITT, Esq.

Saturday,
Nov. 9th.

UPON an appeal against a poor rate for the township of *Kyo*, in the county of *Durham*, by which *W. Morton Pitt*, Esq. was assessed 12*l.* 10*s.* for coal mines, the sessions confirmed the rate, subject to the opinion of this Court on the following case:—

By an act of parliament, 40 G. 3. c. 25. (private) entitled “An Act for dividing, allotting, and enclosing a Common called *Tanfield Moor*, in the Parish of *Chester-le-Street*, in the County of *Durham*,” after reciting that the Marquisses of *Bute* and *Hertford*, and the Earl of *Windsor*, were seised of or entitled to the soil of the said common, and to the quarries of stone, and all other mines and minerals, except the coal mines and seams of coal within and under the same, as tenants in common, in the shares and proportions therein mentioned, and that *W. M. Pitt*, Esq. was seised of or entitled to the collieries and coal mines, and seams of coal, as well opened as not opened, lying and being within and under the said common, together with certain liberties in and over the same for the winning, working, managing, and carrying on the said collieries, and for leading and carrying away the coals; and that certain persons therein named, and several other persons, as owners of messuages, lands, tenements, and hereditaments, were entitled to right of common in and upon the said common, it was enacted that the commissioners therein

By an enclosure act it was declared, that all the allotments to be set out to the several persons having right of common upon a moor, should be deemed to be situate within the same townships and places respectively, wherein the lands lay in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of *W. P.* to certain coal mines under the said moor: Held, that the first clause affected only those portions of the soil which were allotted to the commoners, and not the coal mines under those allotments; and, therefore, that such coal mines were rateable to the relief of the poor in the parish in which

they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere.

named,

1833.

The King
against
Pitt.

named, after deducting so much of the said moor or common as was by the said act directed to be set out for public highways, roads, and drains, and for a common quarry or quarries, common watering places or wells, should set out, allot, and appoint unto and for the said Marquisses of *Bute* and *Hertford*, and Earl of *Windsor*, one full sixteenth part in value, (quantity, quality, and situation considered), of the said residue of the said common as a compensation for their right to the soil of the said common or moor, and for their consent to the division and enclosure thereof, which said sixteenth should be deemed, and was thereby declared, to be within the township of *Tanfield*; and after the said sixteenth part should be so set out and allotted, should set out and allot the remaining part of the said common unto and among the several persons having right of common upon the said common, in proportion and according to the rents or values of their respective messuages, lands, or tenements, in respect whereof they were severally entitled thereto as aforesaid, in the proportions therein mentioned. And it was further enacted, "that all the allotments to be set out to the several persons having right of common upon the said moor or common, should be deemed and were thereby declared to be situate within and parcel of the same townships and places respectively wherein the lands or estates lie in respect of which such allotments should be made." And it was enacted, "that all such lands and grounds as should by virtue of the said act be allotted to any person or persons for or in right of their respective messuages, mills, lands, or tenements, should be held by such person or persons respectively in the same manner, and should be of the same

same nature and tenure as their respective messuages, mills, lands, or tenements, in right or in respect of which such allotments should be made, were holden respectively." And it was also enacted that nothing therein contained should be construed to defeat, lessen, prejudice, or anywise affect the right or interest of *W. M. Pitt*, his heirs or assigns, of, in, and to the coal mines and seams of coal, as well opened as not opened, within and under the said common, but that the said *W. M. Pitt*, his heirs and assigns, should for ever thereafter have, hold, work, and enjoy all and every the coal mines and seams of coal, as well opened as not opened, lying and being within and under the said common.

Pursuant to the said act, the common was divided, allotted, and enclosed. At the time of the passing of the act the whole of the common was situated within the chapelry of *Tanfield*. The lands or estates in respect of which allotments were set out are of various tenures, some being freehold, some copyhold, and some leasehold; and several of such lands or estates are situate within the township of *Kyo*, and other adjoining townships; and by the clauses in the said act before stated, such allotments became and now form part of the respective townships in which the lands or estates, in respect of which such allotments were set out, are situated, and are of the same natures and tenures as such lands or estates in right or respect of which they are respectively holden. Previous to, and for some time after the said division, the coal under the said common was rated to the relief of the poor of the chapelry of *Tanfield*; but some time ago, the coal under the allotments set out in respect of estates in the township of *Kyo*, and also in another adjoining township,

1893.

The King
against
Pitt.

1833.

The King
against
Farr.

ship, was rated to the poor rates for those townships. The coal mines for which the appellant was rated are within and under allotments of the said common, allotted in respect of lands situate within the township of *Kyo*.

Rogers (with whom was *Hadleigh*) in support of the rate. The question, whether the defendant was rateable in respect of his coal mines, depends on that clause of the enclosure act, which provides, "that all allotments to be set out to the several persons having right of common upon the said common, shall be deemed to be situate within and parcel of the townships and places respectively wherein the lands lie, in respect of which such allotments shall be made." Those words, of themselves, are sufficient to transfer the whole soil into the township where the lands are in respect of which the allotments are made; and the question is, whether there be any thing in the act to contravene those words as far as the coal mines are concerned. *Lewis v. Branthwaite* (a) shews that a copyholder, having the surface of the land, has also possession of the sub-soil, although he may have no property in it. [*Parke J.* Have the persons who take these allotments any right to the coal? for the act only transfers what is allotted to the commoners. *Taunton J.* And the allotments are to follow the nature of the soil in lieu of which they are made.] *Townley v. Gibson* (b) shews that the whole soil was transferred into *Kyo*. In that case, by the terms of an act for enclosing the wastes of a manor, a certain allotment was to be made to the lord in lieu of his right and interest

(a) 2 B. & Ad. 437.

(b) 2 T. R. 701.

in the soil; and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, &c. There was a proviso reserving to the lord all seignories incident to the manor, and all *rents*, fines, services, &c., and all other royalties and manerial jurisdictions whatever; and it was held that this clause did not reserve to the lord mines under the allotments made to the tenants, though it appeared there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. [*Parke J.* There the lord received an allotment in lieu of his right to the soil. *Taunton J.* And there was no express reservation of mines as there is here.] The words of the enactments are sufficient to transfer the whole soil, and therefore the coal. The reservation in favour of Mr. *Pitt* was to prevent the act operating on his right of property, but was not intended to prevent the transfer from having its legal effect. It is only to protect his private right, and that is not affected. He may work the mines equally well, in whatever parish they are. [*Taunton J.* The transfer of his property to another parish might very much affect his right: the rates might be different.] In *Townley v. Gibson (a)*, *Buller J.* says, "The general object of this enclosure act was to extinguish all the antecedent rights of the several parties interested, and to create others in lieu of them." Here the antecedent rights are destroyed.

Cresswell, contra, was stopped by the Court.

DENMAN C. J. The allotments to be set out to the several persons having right of common are to be trans-

1833.

The King
against
Pitt.

(a) 2 T. R. 706.

1833.

The King
v. Pitt.

ferred to the townships and places wherein the lands lie, in respect of which such allotments are made. Now, first, it does not appear that *Pitt* had any right of common. The soil is reserved to him in all respects as it was before the act, and his coals were then in the chapelry of *Tanfield*. Then the words of the enacting clause cannot have the operation contended for.

PARKE J. Before the act, the coal and soil were all in the township of *Tanfield*. By the act of parliament, the allotments set out to the several persons having right of common are taken out of that parish, and are to be deemed situate in the townships and places where the lands lie, in respect of which the allotments are made: what is allotted to the commoners, and no more, passes out of the township. The coals were not allotted to the commoners; the commissioners only set out the surface of the soil, which does not include the coals. It is expressly enacted that *Pitt's* right in them shall not be affected; but it would be so by the transfer contended for.

TAUNTON J. The land substituted for the right of common is made of the same tenure and quality, and is to be deemed as having such local situation, as the land in respect of which such right of common originally existed; that is the whole enactment; and it has nothing to do with the coal. *Pitt's* right is expressly reserved in all particulars. I have not the smallest doubt that the coals are rateable in the same place as they were before the act. This was the construction first put upon the act, for the coals were rated in *Tanfield*. Why that was changed, I cannot say. The first construction was right.

PATTERSON

PATTESON J. I agree in the general doctrine, that the owner of the surface is the owner of the soil, down to the centre; but the question here turns on the meaning of the word *allotment*. The act says that the allotments to the commoners shall be deemed to be situate in the place wherein the land lies, in respect of which they are made. Now what is allotted? Not Mr. Pitt's coal mines, for his rights in them are expressly reserved. It is quite clear, therefore, that the locality of his coal mines is not operated upon by the act.

Order of sessions quashed.

1833.

The King
against
Pitt.

The KING *against* The Inhabitants of St.
GEORGE, HANOVER SQUARE.

Saturday,
Nov. 9th.

ON appeal against an order of two justices, whereby *Catherine Seaman* was removed from the parish of *St. George, Hanover Square*, to the parish of *St. Peter, Paul's Wharf*, in the county of *Middlesex*, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The parish of *St. George, Hanover Square*, is governed by a select vestry consisting of 101 persons. In the year 1827, a chapel was erected in *North Audley Street*, in the said parish, and on the 21st of *January* 1828, the vestry of that parish took into consideration what name should be given to the chapel, then nearly finished, and resolved that the same should be called *St. Mark's Chapel*, and that advertisements should be

In a parish governed by a select vestry, public notice was given that the vestry would meet to elect an organist for a newly erected chapel. At the meeting C. S. was elected, and it was entered in the minutes of vestry, that she was appointed organist at 60*l.* per annum. She performed the office for several years, receiving the salary half-yearly, and residing in the

parish, till, on complaint made against her by the congregation, she was order of vestry:

Held, that the office of organist so held by C. S., was not a public annual office, by which a settlement could be gained under 3 W. & M. c. 11. s. 6.

1833.

—
 The KING
 against
 The Inhabit-
 ants of
 St. GEORGE,
 HANOVER
 SQUARE.

published, stating that the vestry would meet on the 11th of *February* to appoint an organist for the chapel. On the 11th of *February* 1828 an election took place at the Board Room in *Mount Street*, by the select vestry, of an organist to the said chapel, on which occasion there were about forty candidates, and the election fell upon the pauper, as appears by the following minute: "11th of *February* 1828. The vestry, pursuant to their resolution of *January* 21st, proceeded to the election of an organist for *St. Mark's Chapel*, and appointed Miss *Catherine Seaman* to that situation, to commence when the organ was in readiness for use, at a salary of 60*l.* per annum." In *May* 1828, the organ being completed, she entered upon her duty, and continued to perform it and to reside in the respondent parish, and received her salary from the vestry, through the vestry clerk, half-yearly (with the exception of the first payment, which was 25*l.* only, from *May* to *Michaelmas* 1828), until the 31st of *March* 1832, when she was discharged by the vestry, as appears by the following entry in their minutes: "At a meeting of the vestry, held on the 31st of *March* 1832, much discontent having been expressed by the pew-renters from time to time to the Rev. *Allen Cooper*, the minister of *St. Mark's Chapel*, of the total inefficiency of the present organist, resolved that she be removed, and that the Rev. Mr. *Cooper* be requested to look out for and recommend a competent person to succeed her, upon the same salary as is now enjoyed by her, it being understood that the person to be appointed shall continue to pay her her salary up to *Midsummer* next." 'The question for the decision of the Court was, whether under these circumstances the pauper gained a settlement in *St. George, Hanover Square*.

Adolphus

Adolphus and Payne in support of the order of sessions. The pauper gained a settlement in *St. George, Hanover Square*, by 3 *W. & M. c. 11. s. 6.*, which enacts, "That if any person who shall come to inhabit in any town or parish, shall for himself and on his own account execute any public annual office or charge in the said town or parish, during one whole year, he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published, as is hereby before required." The notice previously required by the statute (sect. 3.) was intended to prevent the inconvenience which had arisen under the statute 13 & 14 *Car. 2. c. 12.*, by persons coming into parishes and remaining there without the knowledge of the officers, till they were irremovable. But the execution of a public annual office was by its notoriety considered equivalent to a notice, and was therefore allowed by the statute as a substitute for it; and it was very early held, in cases under the act 3 *W. & M. c. 11.*, that it was not material what the office was, so that it was a public annual office, notoriety being the object mainly contemplated by the statute (*a*). The offices of parish clerk (*b*), hog-ringer (*c*), bellman (*d*), have been held sufficient. *Rex v. Mersham* (*e*), where the master of a workhouse was held not to acquire a settlement by serving an office, may be cited on the other side, but there "there was no appointment in writing, nor any entry in the parish

1893.

The King
against
The Inhabit-
ants of
St. George,
Hanover
Square.

(a) *Rex v. Hammond*, 2 *Bott.* p. 173. pl. 233. *Bisham v. Cook*, 2 *Dolt.* p. 173. pl. 234. 6th ed.

(b) *Gasston v. Milwich*, *Salk.* 536. But see *Rex v. Stogursey*, 1 *B. & Ad.* 795.

(c) *Rex v. Whittlesea*, 4 *T. R.* 807.

(d) *Rex v. St. Nicholas, Hereford*, 10 *B. & C.* 832.

(e) 7 *East*, 167.

1833.

The King
against
The Inhabit-
ants of
St. George,
Hanover
Square.

books;" it was rather a contract with the parish officers (pursuant to 9 G. 1. c. 7. s. 4.) than the nomination to an office: and *Le Blanc* J. observed, that it was an employment created by the parties themselves, which they might put an end to whenever they pleased. [*Denman* C. J. Was not this so too?] The parishioners here, by determining to appoint an organist, had agreed upon a certain mode of performing a part of the church service; to abolish the office would have altered that; and at least it could not have been done without the express consent of the parishioners. As it was, the pauper was not dismissed till there had been a complaint on their part, and a vote passed in vestry. There is nothing to compel the keeping of a parish clerk; and there are many other offices which might be abolished, but which, while they exist, are held to confer settlements, because they give the requisite notoriety to the residence of the parties executing them. Here the office was clearly public, for it was advertised as an object of competition; and the mode in which the payments of salary were regulated, shews that it was annual.

Sir James Scarlett, contra, was stopped by the Court.

DENMAN C. J. The principle on which this kind of settlement rests is notoriety, but that must be attained by serving an office within the meaning of the statute. The question is, whether the present be a case in which that has been done. I think it comes within the objection which prevailed in *Rex v. Mersham* (a). According to the argument which has been urged, a settlement

(a) 7 East, 167.

would

would be gained in every case where the party had executed an annual office which was notorious. But I think an office created by the parties themselves who agree upon the employment, and which they may put an end to at pleasure, does not come within the meaning of the statute.

1855.

The King
against
The Inhabit-
ants of
St. George,
Hanover
Square.

PARKE J. I am of the same opinion. If a settlement was gained in this case, it might be said that the fiddlers and bassoon-players in a country church, or even the pew-openers, executed offices within the statute.

TAUNTON J. The office of organist does not necessarily give notoriety, for when persons hear the organ, it does not follow that they know who plays it.

PATTESON J. concurred.

Order of sessions quashed.

DOE dem. REED *against* SOPHIA TAYLOR.

THIS was an ejectment brought to recover an undivided fifth part of a house and land in the parish of *Berkeley*, in the county of *Gloucester*. At the trial before *Littledale J.* at the spring assizes for the county of *Gloucester*, 1832, the following appeared to be the facts of the case:—

Livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having

title, unless the child was placed there for the purpose of representing that party.

If there be several coparceners, and one only be in actual possession, a feoffment executed by her to a stranger, of the whole premises, will oust the other co-parceners.

In the absence of evidence to the contrary, the entry of such co-parcener will be presumed to have been a general entry, and not for herself alone, or for herself and the other co-parceners.

1833.

Dox dem.
 REED
 against
 TAYLOR.

James Taylor, the grandfather of the lessor of the plaintiff, was owner of the entirety of the premises in question, and died in or about the year 1815, not having made a will, leaving five daughters his co-heiresses. The lessor of the plaintiff was the son and heir of one of the co-heiresses. The defendant, *Sophia Taylor*, one of the other co-heiresses, was in the occupation of the premises before and at the time of the trial and of the feoffment herein-after mentioned, and still is so. In *Hilary* term 1822 she levied a fine with proclamations of the whole premises to *James Player*, and in *May* 1822 she executed a feoffment, with livery of seisin, to *Player*. The defendant contended that this fine and feoffment with livery operated as an ouster and disseisin of the other persons as to the whole, and not a fifth part only, of the premises. It appeared that before seisin was delivered to *Player*, *Sophia Taylor* turned all the persons off the premises, except as after mentioned; and that having been done, she delivered seisin to *Player*. Before the executing of the feoffment, there was a child between four and five years old living with *Sophia Taylor* in the house, and it was doubtful whether the child was in the house at the time of the livery of seisin or not. It did not appear in evidence whether or not the child was related to any of the co-heiresses. The plaintiff contended, that if the child was in the house at the time of the livery of seisin, the livery of seisin would be void, and the plaintiff was entitled to a verdict, on the authority of 2 *Black. Com.* 315., where the manner of delivering seisin is thus described:—
 “The feoffor, if it be land, doth deliver to the feoffee, all other persons being out of the ground, a clod, or turf, or a twig or bough there growing; but if it be of a
 house,

house, the feoffor must take the ring or latch of the door, *the house being quite empty*," &c.

The jury being of opinion that the child was in the house at the time seisin was delivered, the learned Judge, on the authority cited from *Blackstone*, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. A rule nisi having been obtained for that purpose,

1833.

DOX dem.
REED
against
TAYLOR.

Ludlow Serjt. and *Talfourd* shewed cause in *Hilary* term last (a). The rule on this subject is thus laid down in *West's Symboleography*, lib. 2. part i. section 251.:—"All persons having any lawful possession or seisin in the thing of which seisin is to be delivered, ought either to join together in making the livery of seisin, or to be removed thence, as lessees for years or for life, for every livery ought to bring an immediate possession unto the feoffee." The defendant's co-parceners here were constructively in possession. That, in order to constitute a good livery of seisin, *all persons* should be removed off the premises, is shewn by 2 *Black. Cum.* 315.; *Perkins's Prof. Book*, s. 209.; *Shep. Touch.* p. 214. And *Fitz. Abr. tit. Assize*, 418., is precisely in point, to shew that the child's remaining in the house in this case was a sufficient continuance of possession to make the livery void (b): and that authority is cited in *Bro. Abr. Feoffments de Terres*, pl. 80. In *Bettisworth's* case (c) the lessor made a feoffment of the house and land, and gave livery on the land, the lessee remaining in the house and not assenting; and it was held that the livery was not good.

Secondly, the livery was void, because the co-par-

(a) Before *Littleale, Taunton, and Patteson Js.*

(b) See page 580. post.

(c) 2 Co. 31 b.

1833.

DOX dem.
 REED
 against
 TAYLOR.

ceners, who were then possessed, did not join in the feoffment. In contemplation of law, all the co-parceners were in possession of the house, for the possession of one co-parcener is the possession of another. In *Com. Dig. tit. Parcener, A. 3.*, it is laid down, that "if one parcener enters into the whole land, generally, and takes the profits, it shall be the entry of both, and does not divest the moiety of her sister. Or, if both enter, and afterwards one takes all the profits, this does not divest the moiety of her sister without an actual ouster and disseisin." Now, here, the feoffee could not act both parts; she could not oust the co-parceners and enfeoff at the same time. If *Sophia Taylor* had first disseised her co-parceners, she might afterwards enfeoff; but, here, at the very moment she gave livery of seisin, she was holding for her sisters. The possession of one joint tenant is the possession of the other, so as to bar the statute of limitations; and if one joint tenant levies a fine, it severs the jointure, but does not amount to an ouster of his companion. *Ford v. Lord Grey (a)*.

Sir *J. Campbell* (Solicitor-General) and *John Evans* contra. The fine, supported by the feoffment with livery, created an ouster and disseisin. As to the first objection, which was the only one made at the trial, the language of *Blackstone J.* must be understood to refer to the vacancy of the possession, not to the necessity of removing from the house or land any stranger who may be found there, but who neither claims nor possesses any interest in the premises. If it were otherwise, it would be impossible to make livery of a public inn, or of a house in which there was a sick person; or the livery might

(a) 1 *Salk.* 285. 6 *Mod.* 44.

be rendered void, by having a person concealed on the premises, or, where the estate was large, in a remote part of it. The correct rule is laid down in *Shep. Touch.* 213. :— “ That, in the making of every livery of seisin, it is necessary that all persons that have *any lawful estate and possession* in the thing whereof livery is to be made, *as lessees for life, years, and such like*, join in the making thereof, or be removed thence; for every livery ought to bring an immediate estate of possession to the feoffee, donee,” &c. The authorities cited on the other side to shew the necessity of removing *all* persons apply only to those who were of the family of the person sought to be ousted by the feoffment, or may be considered to represent such person.

It is now further objected, that the feoffment by the defendant did not work an actual ouster of the other co-parceners, inasmuch as the possession of one co-parcener is, in law, the possession of all. In answer to this objection, *Townsend and Pastor's* case (a) is expressly in point. There, it was held that a feoffment in fee by one co-parcener of the *whole* estate held in co-parcenary, operated, as to her own share, by rightful conveyance, and, as to that of her co-parcener, by disseisin. So, as to joint tenants, it is said in *Perkins*, s. 220. :— “ If two joint tenants are in fee, and one of them doth enfeoff a stranger of the whole, against the will of his companion, being upon the land, nothing passeth by this feoffment but the moiety only.” The plain inference from this is, that if the other joint tenant had not been upon the land, the entire estate would have passed.

Cur. adv. vult.

(a) 4 *Leon.* 52.

1838.

DOX DEM.
REED
against
TAYLOR.

1833.

—
Dox dem.
REED
against
TAYLOR.

LITTLEDALE J. now delivered the judgment of the Court. After stating the facts, and the grounds of the motion, his Lordship said :— On cause being shewn against the rule, it was admitted that a fine alone would not have the effect of creating an ouster and disseisin : *Peaceable dem. Hornblower v. Read and Another (a)*. Besides the authority from *Blackstone*, the plaintiff relied on *Perkins*, s. 209., where it is said, that to deliver seisin, the manner is *to remove all persons off the land*. And also *Skeppard's Touchstone*, p. 214., where, after describing the deed of feoffment, &c., it is said, the manner of making livery is, that the feoffor, if it be a house, do take the ring, latch, or hasp of the door, (*all the people, men, women, and children, being out of the house,*) or if it be of a piece of ground, do take a clod of the ground, or a bough or a twig of a tree or bush growing thereupon, and (*all the people being out of the ground*), the same ring, &c., clod, bough, &c., with the deed, do deliver to the feoffee, &c., and in the delivery of seisin do use the words there mentioned.

In *Fitzherbert's Abridgment*, Tit. *Assize*, 418., one S. was seised in fee of a messuage, and made a lease for years to M., and afterwards gave the same messuage to one K., and delivered seisin to him, M. being out of the house at the time of the livery of seisin ; but it appeared that M. had a *garson* within when seisin was delivered, and therefore the livery of seisin was held to be void.

And this case is cited in *Brooke's Abridgment, Feoffments de Terres*, pl. 80., that a man may make livery of seisin of the land of the termor in his absence, notwith-

(a) 1 East, 568.

standing the termor has chattels on the land, but otherwise if he has a *garson* on the land.

In *Dyer* 18. b., a man was seised of a messuage and of a close adjoining the messuage, and made a lease of the messuage for a term of years, or for life, and afterwards made a feoffment of the messuage and close, and delivered seisin in the messuage (the termor being at market, and his wife and children in the house) in the name of all; and the question was, whether the house passed. And it seems not, inasmuch as the continuance of the wife and children of the lessee saved the right and possession of the lessee.

In these cases from *Fitzherbert*, *Brooke*, and *Dyer*, there was somebody remaining in the house who was of the family of the termor, who was in the actual possession of the property, and whose right was sought to be taken away by the feoffment and livery in his absence; and that falls within the principle of what is said in *Shepard's Touchstone*, p. 213., that in the making of every livery of seisin "it is requisite that all persons who have any lawful estate and possession in the thing whereof livery is to be made, as lessees for life, years, and such like, join in the making thereof, or be removed thence; for every livery ought to bring an immediate possession to the feoffee, donee, &c."

With regard to the livery in question, if the child was a part of the family of one of the co-parceners intended to be ousted, and was placed in the house to represent such co-parcener, then we think he ought to have been put out of the house before the livery. But, unless he had been placed to represent one of such co-parceners, we think that the child being suffered to remain in the house would not make the livery invalid, even

1839.

Don dem.
Ramo
agrinat
Taylor.

CASES IN MICHAELMAS TERM

1833.

Don dem.
Read.
against
TAYLOR.

even if he had been a descendant of one of the co-parceners, if he was a mere inmate of the family of *Sophia Taylor*.

Another objection was made to the feoffment, that though, if *Sophia Taylor* had entered on the land on a vacant possession, and taken the whole profits adversely, then, if she had made the feoffment, that would have been a disseisin; yet, as it was contended, she was not in lawful possession of the whole, but was bailiff and servant to the other co-parceners as to part; and they, in contemplation of law, must be taken to be in possession, and therefore *Sophia Taylor* could not, by any feoffment, deprive them of their right. But we are of opinion that this does not constitute an objection.

In *Perkins*, s. 220., it is said, that “if two joint tenants are in fee, and one of them doth enfeoff a stranger of the whole against the will of his companion, being upon the land, by this feoffment but a moiety passeth; *causa patet*,” but that seems to imply, that if he was off the land the feoffment would bind him. And the same rule is stated in *Sheppard’s Touchstone*, p. 208. “If one joint tenant make a feoffment of the whole land, his companion being then upon the land; by this there doth pass no more but a moiety, and the feoffment is void as to the moiety of his companion, for the feoffment doth not give his moiety.”

The reason seems to be, that, as to the other moiety, he has not the possession; and, therefore, as to that moiety the livery is void. But we think, that if the other joint tenant is not on the land, the feoffment will amount to a disseisin.

What is before stated is as to joint tenants; but the same principle seems to apply to co-parceners. In

Townsend

Townsend and Pastor's case (a), it was holden in the Common Pleas by all the Justices, "that where two co-parceners are in the use of a manor, after the statute of 1 Ric. 3., the one of them enters and makes a feoffment in fee of the whole manor, that this feoffment is not only of the moiety of the manor whereof she might lawfully and by the said statute make a feoffment, but also of another moiety by disseisin."

1833.

DOE dem.
 REWD
 against
 TAYLOR.

In *Gerry v. Holford (b)*, an ejectione firmæ was brought, and a special verdict found that there were two co-partners of a house: the one entered generally, and made a lease for life by the name of "all that his house," &c.; the question was, whether all or the moiety only of the house passed. *Popham* and *Fenner* held, that the entire house passed; for when he saith, "all that my house," &c., that intended the whole house; and by his livery made he gained the entire and gave the entire, although, by his general entry, it is not intended that he entered into more than to what he had a right. *Gawdy* è contrà. For, as his entry primâ facie doth not gain more than he had a right to demand, no more shall this lease. *Foster*, at the bar, cited that it was adjudged in this Court in *Reignold's case*, according to the opinion of *Popham*.

In these last two cases, the co-parcener is stated to have entered, and the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all; for entry generally shall always be taken according to right. Several cases to this effect will be found in 9th *Viner's Abridgment*, Title *Entry F.*, where many authorities in 1 *Roll's Abr.* 740.,

(a) 4 Leon. 52.

(b) Cro. Eliz. 615.

1833.

DAWSON
against
DYER.

neglected to pay the same or any part thereof. The defendant also pleaded in like manner that the plaintiff did not insure. Demurrer, assigning for cause, that the plaintiff's covenants in the pleas mentioned "are independent of the covenant of the defendant in the said declaration mentioned, and do not in anywise qualify, or constitute a condition precedent to the performance by the defendant of that covenant." | Joinder in demurrer. The demurrer came on to be argued in this term (a), and *Follett*, for the plaintiff, having mentioned the cases of *Hays v. Bickerstaffe* (b) and *Warren v. Asters* (c), the Court called upon

Barstow in support of the pleas. The earlier decisions, which have turned upon the distinction between covenants and conditions, do not furnish any precise rule upon the subject; as is said in *Platt on Covenants*, (p. 71.) "So refined and subtle are the distinctions on which they have proceeded, that it is almost impossible to draw from them any reasons, as a guide to discover with certainty whether covenants are dependent or not. Some of the determinations have incurred the censure of outraging common sense; others of deciding contrary to the real meaning of the parties and the true justice of the case:" and cases are there referred to which support this observation. In modern times the disposition of the courts has been to look, not at the particular clause only, but at the whole deed, and to collect from it the intention of the parties. Looking to that, and to the reason of the case, it will be evident here that the payment of rent was intended to be a condition precedent to the landlord's performance

(a) *Nov. 8th.*(b) *2 Mod. 34.*(c) *Sir T. Jones, 205.*

of the covenant for quiet enjoyment. That covenant is introduced for the purpose of limiting the liability of the landlord, who would otherwise be bound to warrant to the lessee an undisturbed possession generally. *Nokes's case (a)*. The covenant in this case confines the landlord's liability to the acts of persons claiming under him; and also makes it dependent on the lessee's performance of every thing covenanted by him. The landlord reserves to himself a right of re-entry if the rent should be in arrear more than twenty-one days, which is admitted to have been the case here. The defendant might after that time have brought ejectment against the plaintiff; and it cannot have been intended by the deed of demise that the plaintiff should have an action against the defendant for disturbance of his possession at the very time when the defendant was entitled to treat him as a trespasser. [*Denman C. J.* According to that argument, the tenant, if evicted while the rent was so in arrear, could not have maintained an action, though the landlord had waived the forfeiture.] The waiver might perhaps have been matter of reply, if the forfeiture had been pleaded. As to the cases; in *Hays v. Bickerstaffe (b)*, there was no clause of re-entry. In an *Anonymous case, 4 Leon. (c)*, the decision of two judges is in point for the present defendant. And in *Simpson v. Titterell (d)*, where land was let for years, "proviso semper, and it is further covenanted, that the lessee shall not assign his term" except in manner specified, the court held that the words amounted to a condition. [*Parke J.* The reason given there is against you; for it is said by the court, that a proviso always implies a

1833.

 DAWSON
against
DREA.

(a) 4 Rep. 80. b. Cro. Elis. 674.

(b) 2 Mod. 34.

(c) 4 Leon. 50. pl. 130.

(d) Cro. Elis. 242.

1833.

DAWSON
against
DYER.

condition, if there be not words subsequent which may change it into a covenant; as where there is a penalty annexed for non-performance. The proviso in the present case is introduced to reserve a power to the landlord on the particular occasions specified; if he, or any person claiming under him, enters on the tenant except by virtue of that power, the landlord is liable on the covenant for quiet enjoyment.]

Per Curiam (a),

Judgment for the plaintiff.

(a) *Denman C. J., Parke, Taunton, and Patteson Js.*

Monday,
Nov. 11th.

MITCHELL against JENKINS, Clerk.

In an action for a malicious arrest, malice is a question of fact for the jury, who are at liberty, but not bound, to infer it from the want of probable cause; and where a creditor had caused his debtor to be arrested for 45*l.*, knowing that there was a set-off to the amount of 16*l.* 5*s.*, but instructed the bailiff who made the arrest, to allow the

set-off in case the debtor would settle the debt; and the Judge, upon the proof of these facts, was of opinion that there was no probable cause for the arrest, and that there was malice in law, inasmuch as the act of causing the party to be arrested for a larger sum than he owed was wrongful, and therefore told the jury that the only question for them was the amount of damages; the Court granted a new trial, on the ground that it ought to have been left to the jury to find whether there was malice or not.

CASE for maliciously and without any reasonable or probable cause of action against the plaintiff to the amount of 45*l.*, having caused him to be arrested and held to bail for that sum. Plea not guilty. At the trial before *Taunton J.* at the Summer assizes for the county of *Devon* 1832, the following appeared to be the facts of the case:—The plaintiff at *Lady-day* 1831 became indebted to the defendant as vicar of *Sidmouth* in the sum of 45*l.* for one year's composition of tithe. On the 15th of *April Jenkins* applied by letter for payment of the tithes, and offered to allow to the plaintiff a set-off, if produced and found to be correct. The plaintiff, not

having

having produced any such set-off, *Jenkins* sued out a writ of habeas corpus for bail for 45*l.*, the gross amount of his demand, without allowing any deduction. The sheriff's officer who made the arrest for 45*l.* told *Mitchell* that he was authorized to allow a deduction of 16*l.* 5*s.* *Mitchell* gave a bail bond. On the 16th of July *Jenkins's* agents wrote the following letter to *Mitchell's* agents:—

"It having been discovered that the defendant was arrested for the sum of 45*l.*, the amount of the original debt, without allowing for any set-off, and as you may be defending this cause with reference to the statute 43 G. 3. c. 46. s. 3., we are requested by the plaintiff's attorney to state, that the arrest for such sum was without any intention to harass or annoy the defendant, but through an inadvertence, which he regrets. If the defendant, on being allowed his claimed set-off of 16*l.* 5*s.*, and his costs to the present time, will immediately pay the balance, we are authorized and prepared to receive such balance as a settlement of the action." *Mitchell's* agents declined the proposition, without offering any other terms of compromise; and upon this the action was discontinued and the costs paid by *Jenkins*. It was proved on the part of *Mitchell* that he had a right of set-off, to the amount of 16*l.* 5*s.* Upon these facts it was contended at the trial, that it was a question for the jury, whether *Jenkins* had acted bonâ fide under a mistake in law. On the other hand it was maintained, on the authority of *Bromage v. Prosser* (a), that the arresting of *Mitchell* for a larger sum than was actually due from him, was an unlawful act, from which malice in law was of necessity to be implied. The learned judge was of opinion, that as there existed a set-off, which re-

1833.

 MITCHELL
against
JENKINS.

(a) 4 B. & C. 247.

1833.

MITCHELL
against
JENKINS.

duced *Jenkins's* demand, *Mitchell* ought not to have been arrested for more than the balance; and that *Jenkins* therefore had no reasonable or probable cause for arresting him for the sum of 45*l*. As to the question of malice, he said there were two kinds of malice,—malice in law and malice in fact; and that in this case there was malice in law, inasmuch as the act of causing *Mitchell* to be arrested for a larger sum than was due was wrongful; and that the only question for the consideration of the jury was the amount of damages. The jury found a verdict for the plaintiff, damages 20*l*. A rule nisi having been obtained for a new trial, on the ground that the question whether *Jenkins* acted maliciously ought to have been left to the jury,

Follett now shewed cause. The learned judge was correct in withdrawing the question of malice from the jury, because *Jenkins's* causing *Mitchell* to be arrested for a larger sum than was due, was a wrongful act, done intentionally without just cause or excuse, and therefore malicious in the legal sense of that word. The jury under those circumstances were bound to infer malice. The term malice in common acceptation means ill-will against a person; but, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse. This was laid down by *Bayley J.* in *Bromage v. Prosser* (a); and it was there decided that in ordinary actions for slander, malice in law is to be inferred from publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions of slander *prima facie* excusable on account of the cause of publishing the slander, malice in

(a) 4 B. & C. 255.

fact must be proved. The same rule must hold in an action for a malicious prosecution or arrest. [*Parke J.* A man who utters slander of another does an act *prima facie* wrongful, but a man who arrests another for a debt is pursuing a legal right in a legal mode; his act is therefore *prima facie* rightful. The doctrine that malice must of necessity be inferred where there is a want of probable cause, is at variance with that laid down by Lord *Mansfield* and Lord *Loughborough* in their printed reasons for their judgment in *Johnstone v. Sutton (a)*. There it is said, "In this case" (viz. an action for a malicious prosecution), "to support the verdict, there was nothing necessary to be proved but that there was no probable cause, from whence the jury *might*" (*not must*) "imply malice, and might imply that the defendant knew there was no probable cause." This case does not fall within the rule laid down in *Ravenga v. Mackintosh (b)*, that where a party acts upon legal advice, he is excusable; for here it does not appear that *Jenkins*, before he made the arrest, took any such advice. In *Parrott v. Nishwick (c)*, it is stated to have been ruled, "that where the facts lie in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the grand jury; or the plaintiff shall recover without proving express malice;" but there is the following note of that case in 9 *East*, 362. "In an action for a malicious prosecution in preferring an indictment for perjury, where the bill of indictment was found and the plaintiff acquitted by verdict, Lord *Mansfield* in summing up said it was not necessary to prove express malice, for *if it appeared that there*

1853.

MIREHILL
against
JENKINS.

(a) 1 T. R. 545.

(b) 2 B. & C. 693.

(c) *Hull. N. P.* 14. cited in 9 *East*, 362.

1833.

MITCHELL
against
JENKINS.

was no probable cause, that was sufficient to prove an implied malice, which was all that was necessary to be proved to support this action." If that be so, the Judge here was bound to tell the jury that there was sufficient evidence to imply malice, and would be so again; and therefore it will be useless to send the case down to second trial. In *Gibson v. Chaters* (a) it was held that in an action for maliciously holding to bail, it was not sufficient to prove that the writ was sued out after payment of the debt, where the circumstances precluded any inference of malice; but it is sufficient to say that that is not so here. It has been held under 43 G. 3. c. 46. s. 3., that proof of the want of reasonable or probable cause was sufficient to entitle a party to his costs for a malicious and vexatious arrest, *Donlan v. Brett* (b): so in *Forster v. Weston* (c), where the arrest was for one side of an account, it was held that the defendant was entitled to his costs under that statute. In *Austin v. Debnam* (d), the defendant having arrested the plaintiff for the amount of one side of an account, without deducting what was due on the other, the plaintiff brought an action for a malicious arrest, and it was held by this Court that such arrest was malicious, and without probable cause.

Coleridge Serjt. and Bere contra. In *Austin v. Debnam* (d) Lord *Tenterden* left the question of malice to the jury, and that case was decided expressly on the authority of *Dronefield v. Archer* (e), which turned entirely upon the 43 G. 3. c. 46. s. 3. That act gives costs

(a) 2 Bos. & Pul. 129.

(b) 10 B. & C. 117.

(c) Ibid. 527.

(d) 3 B. & C. 139.

(e) 5 B. & A. 513.

to a defendant where the plaintiff holds him to bail for any greater amount than he recovers, without reasonable or probable cause, but does not require that the arrest should be malicious. In *Snow v. Allen (a)*, a plaintiff who, acting under what he conceived to be sound advice, took the defendant in execution after he had taken the defendant's bail in execution, was held not to be liable to an action for a malicious arrest, although, previous to the arrest, he had notice from the defendant that his proceedings were irregular; and there the plaintiff was nonsuited for want of proof of malice; *Ravenga v. Mackintosh (b)* was a similar case. Here there was fair ground for the jury to presume that *Jenkins*, when he made the arrest, was acting bona fide under the idea that the law authorized him so to do; for he instructed the sheriff's officer to accept the balance due, and not the sum named in the writ. At all events, the question of malice ought to have been submitted to the jury.

1833.

 MITCHELL
 against
 JENKINS.

DENMAN C. J. Every arrest by a creditor for more than is due, is, in some sense, a wrongful act. By statute, if it be made without reasonable or probable cause, though with an entire absence of malice, the party arresting may be deprived of his costs, and at common law, if the party arrested has suffered damage to a greater extent than those costs, he may, if the arrest was also made maliciously, bring his action on the case. In that action, however, it is still incumbent on the plaintiff to allege and to prove malice as an independent fact; though it may in some instances

(a) 1 Starkie's N. P. C. 502.

(b) 2 B. & C. 693.

1893.

MITCHELL
against
JENKINS.

be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide, as a matter of fact, whether there be malice or not. I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the Court, and malice to be altogether a question for the jury. Here, the question of malice having been wholly withdrawn from the consideration of the jury, there ought to be a new trial.

PARKE J. I am also of opinion that there ought to be a new trial, on the ground that the learned Judge withdrew altogether from the consideration of the jury the question of malice. I have always understood, since the case of *Johnstone v. Sutton (a)*, which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the Judge. I can conceive a

(a) 1 T. R. 510.

case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. That would not be the case where, there being an unsettled account, with items on both sides, one of the parties, believing *bonâ fide* that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting *bonâ fide* under a wrong notion of the law and pursuant to legal advice. The question of malice having in this case been wholly withdrawn from the jury, I think the rule for a new trial must be made absolute.

1833.

MITCHELL
against
JENKINS.

PATTESON J. The whole argument for the defendant may be shortly summed up thus:—The question of malice ought to have been submitted to the jury, who might have inferred it from the want of probable cause; but they were not bound of necessity so to do. Here it was not left to the jury to infer malice; if the jury are to be told that where a want of probable cause is proved, malice must necessarily be inferred, it will, in future, be only necessary in every case to prove want of probable cause; whereas, it is essential for a plaintiff to prove facts from which the Judge may decide that there is

want

1893.

MITCHELL
against
JENKINS.

be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide, as a matter of fact, whether there be malice or not. I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the Court, and malice to be altogether a question for the jury. Here, the question of malice having been wholly withdrawn from the consideration of the jury, there ought to be a new trial.

PARKE J. I am also of opinion that there ought to be a new trial, on the ground that the learned Judge withdrew altogether from the consideration of the jury the question of malice. I have always understood, since the case of *Johnstone v. Sutton (a)*, which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the Judge. I can conceive a

(a) 1 T. R. 510.

case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. That would not be the case where, there being an unsettled account, with items on both sides, one of the parties, believing *bonâ fide* that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting *bonâ fide* under a wrong notion of the law and pursuant to legal advice. The question of malice having in this case been wholly withdrawn from the jury, I think the rule for a new trial must be made absolute.

1833.

MITCHELL
against
JENKINS.

PATTESON J. The whole argument for the defendant may be shortly summed up thus:—The question of malice ought to have been submitted to the jury, who might have inferred it from the want of probable cause; but they were not bound of necessity so to do. Here it was not left to the jury to infer malice; if the jury are to be told that where a want of probable cause is proved, malice must necessarily be inferred, it will, in future, be only necessary in every case to prove want of probable cause; whereas, it is essential for a plaintiff to prove facts from which the Judge may decide that there is want

1833.

MITCHELL
against
JENKINS.

want of probable cause, and the jury that there is malice.

TAUNTON J. At the trial I acted upon the decision in *Bromage v. Prosser* (a). That was an action of slander, and it was held, that although malice was the gist of the action, there were two sorts of malice,—malice in fact and malice in law; the former denoting an act done from ill-will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse; and that in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but that in actions for slander *primâ facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved. It appeared to me that the present defendant *Jenkins*, having sued out a bailable writ for 45*l.*, knowing that there was a set-off to the amount of 16*l.* 5*s.*, had been guilty of a wrongful act, and therefore that malice in law ought to be presumed. It struck me that there was no distinction (in this respect) between an ordinary action for slander and an action for malicious arrest; but I am now satisfied that in this latter form of action malice is a question of fact, which ought to be left to the jury. The rule for a new trial must therefore be made absolute.

Rule absolute.

(a) 4 B. & C. 47

1833.

The KING *against* The Inhabitants of FRIESTON.*Monday,*
Nov. 11th.

FLANAGAN moved for a rule calling on the justices of the Isle of *Ely* to shew cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal against an order of removal, in which the inhabitants of the parish of *Frieston*, in the county of *Lincoln*, were the appellants, and the inhabitants of *Tydd St. Giles*, in the Isle of *Ely*, respondents; and to receive evidence of a certain written agreement which had been tendered for the appellants at the trial of the appeal at the last *October* sessions for the Isle of *Ely*, and rejected. It appeared by the affidavit in support of the application, that, the respondents having proved a *primâ facie* settlement, the appellants' counsel proposed to prove a subsequent settlement by renting a tenement. The renting was under a written agreement, and on the document being put in, the respondents' counsel objected that it was not receivable, because, though it purported to be an agreement by both parties, it was signed by the tenant only. The sessions, on this ground, held the writing to be inadmissible, and they refused to hear parol evidence of the tenancy. The appeal was therefore dismissed, and the bench declined granting a case.

Where the quarter sessions have improperly decided against an appeal on a preliminary objection, the Court of K. B. will grant a mandamus to them to enter continuances and hear the appeal: but where an objection has been made, during the trial of an appeal, to the reception of a particular piece of evidence, and the sessions have held such objection valid, in consequence of which the appeal has been dismissed, this Court will not interfere, unless the sessions send up a case.

Flanagan now proposed to shew from authorities that the agreement ought not to have been rejected. [Lord *Denman* C. J. Suppose the sessions have made a mistake, but have refused to take the opinion of this Court

on

1833.

The King
against
The Inhabit-
ants of
FAIRFORD.

on this question: can we interfere?] The Court has interfered in such cases, without any application from the sessions. *Rex v. The Justices of Wiltshire (a)*, *Rex v. The Justices of Lancashire (b)*, *Rex v. The Justices of Gloucestershire (c)*. In the last-mentioned case the appeal had been partly gone into, when an objection was taken, upon which the sessions dismissed the case. Lord *Tenterden* there said, "I think that the appeal was not heard, and that the grounds of refusal were insufficient;" and *Bayley J.* observed, "It is true there is here the form and ceremony of hearing a witness, but then an objection is taken, which is in fact a preliminary one, and goes to prevent the Court from exercising any jurisdiction." Here the objection was one which prevented the merits of the appeal from being gone into, and it cannot be contended that the sessions, having dismissed an appeal on such a ground, may exclude the interference of this Court, by refusing a case.

Lord DENMAN C.J. In the present instance the appeal was, in fact, heard. It is said the justices were mistaken in their decision; but if they were, they are the judges of the law, and we cannot grant a new trial. The cases where this Court has interfered have turned upon matters of preliminary practice, and have arisen where the Court thought the practice not, in its own nature, legal, or not consistent with the rules by which the sessions themselves professed to be guided. The present objection was not a preliminary one, in the sense in which that word was used in one of the cases referred to: it was indeed preliminary to the reception of a

(a) 10 *East*, 404.(b) 7 *B. & C.* 691.(c) 1 *B. & Ad.* 1.

particular

particular piece of evidence; but where there is merely a wrong judgment on a point of that description, this Court has no jurisdiction to correct it unless the sessions send a case. I therefore think that all the authorities cited fall short of the point now contended for, and that the rule cannot be granted.

1833.

The King
against
The Inhabit-
ants of
FAIRFAX.

TAUNTON J. (a) I am of the same opinion. This is not one of the cases where the sessions have refused to hear and this Court has therefore granted a mandamus. Here the sessions have refused to admit a piece of evidence, erroneously, as it is said; but, at all events, they have heard the appeal, and they have not sent up a case.

PATTESON J. It cannot be contended that if the sessions have merely given a wrong judgment on a point of evidence, this Court can review it without a case being sent up. It is true that, where they have dismissed an appeal on a preliminary objection, this Court may overrule their decision; but the objection here, though it was preliminary to the admission of certain evidence, was not preliminary to the hearing of the case. There is no instance in which the Court has granted a mandamus under such circumstances.

Rule refused (b).

(a) *Parke J.* having been appointed a member of his Majesty's Privy Council, was sitting on the Judicial Committee of that body, constituted by stat. 3 & 4 W. 4. c. 41. s. 1.

(b) See *Rex v. The Justices of the West Riding of Yorkshire*, post.

1833.

Monday,
Nov. 11th.

Lock against VULLIAMY.

No precise form of words is necessary to constitute an award; it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. But where an arbitrator, to whom a dispute between an architect and his clerk, respecting a claim by the latter to wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not shew experience or ability to the extent to justify a demand for remuneration under the circumstances; but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10*l.*: Held, that the latter part of the letter was a mere suggestion of the arbitrator, and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and, therefore, not a good award.

INDEBITATUS assumpsit for wages or salary due and payable for the service of plaintiff, as the hired servant of defendant, in his business of a surveyor and architect. The defendant pleaded the general issue, and paid 10*l.* into Court. At the trial before *Patteson J.*, at the *Middlesex* sittings in *Easter* term 1833, it appeared that an action was brought to recover wages for the plaintiff's services as a clerk or assistant to the defendant, a surveyor and architect. The defence was, that on the 9th of *January* 1832, it had been agreed between the plaintiff and defendant to refer the matter to one *Goldicutt*, and that he had made his award. *Goldicutt*, being called as a witness, stated, that *Lock* having claimed wages of *Vulliamy*, and the claim being disputed, it was verbally agreed that the differences between them should be referred to him, and that, after he had examined some plans and sketches made by *Lock* for the defendant, while in his office, and heard both parties, he wrote the following letter, addressed to the defendant:—"I have examined the drawings made by Mr. *Charles Lock*, with an account of his time, in his presence, at Mr. *Vulliamy's*, which does not bear testimony of experience or ability to the extent to justify him in making a demand for remuneration, under the circumstances in which he came to that gentleman's office. But in consideration of his services out of the office on

some

some occasions, and to meet the circumstances of the case in a liberal manner, I propose Mr. *Vulliamy* should pay Mr. *Charles Lock* 10*l.*" This letter *Goldicutt* sent to the defendant, but the plaintiff had no notice of it until after action brought. The learned Judge thought that *Goldicutt's* letter was not an award, that it bound nobody, and therefore that it was no answer to the action; and he observed that the employment of the plaintiff was *prima facie* evidence of his being entitled to wages, and that there was no proof of any agreement that he was not to receive any, and he left it to the jury to say if he was entitled to any, and to how much. The jury found for the plaintiff, damages 16*l.* A rule nisi for a new trial having been obtained, on the ground that the subject-matter of the action had been decided by the arbitrator,

1833.

Lock
against
VULLIAMY.

F. Pollock in this term shewed cause. The letter is not an award on the points submitted. At all events, it was not published before the present action was brought. It was merely sent to one of the parties. If the award was not complete at the time when the action was brought, the bringing of the action by one of the parties to the submission, determined the authority of the arbitrator. If it be an award that *Vulliamy* owed *Lock* 10*l.* and was published after action brought, it should have been pleaded specially. But in fact it is not a decision that 10*l.* was due. It is a mere proposal or suggestion made by the arbitrator, to the defendant, that he should pay the plaintiff 10*l.*

Sir *James Scarlett* and *R. V. Richards* *contra*. No specific form of words is necessary to constitute an award.

V^{OL}. V.

R r

It

1833.

Lock
against
Vulliamy.

It is sufficient if the words used amount in substance to a decision of the points submitted. In *Matson v. Trower* (a) an arbitrator stated that he was of opinion that one party was entitled to claim of the other a given sum for non-performance of a contract for fifty puncheons of brandy, and Lord *Tenterden* held that to be a good award. Here, the arbitrator meant to say that in his opinion and judgment *Lock* was entitled to recover nothing for his services in *Vulliamy's* office, but that he was entitled to recover 10*l.* for his services out of the office. The delivery of the award to the defendant was a sufficient publication. [*Denman* C. J. The Court have no difficulty on that point.]

DENMAN C. J. I think the letter in question is not an award. It appears by it that the plaintiff sought to recover for two sets of services; first, for services in the office, and, secondly, for services out of the office. The arbitrator seems to have thought that the instruction received by the plaintiff was a compensation for the first set of services; but as to the second, he has come to no decision, but merely makes a proposal that the defendant, to meet the circumstances in a liberal manner, should pay 10*l.* That is a mere suggestion to the defendant to pay that sum, if he is disposed to act liberally. It is not an expression of an opinion that *Lock* was entitled of right to recover that sum. I agree that no precise form of words is necessary to constitute an award. It is sufficient if the language be such as to shew clearly that the arbitrator has come to a decision upon the points submitted to him. In *Matson v.*

(a) *Ryan & M.* 17.

Trower (a) the award was good, for the arbitrator, there, expressed a decisive opinion upon the matters submitted to him. Here the arbitrator has not decided, but merely suggested that the one party, if he meant to do a liberal thing, should pay 10*l.* to the other.

1835.

Lock
against
VULLIANT.

PARKE J. The rule must be discharged. I am quite satisfied that the latter part of the instrument does not amount to an award. I agree that no precise form is necessary to constitute such an instrument. It is enough if it appear that the arbitrator has finally decided on the matters submitted to him. If it had appeared in this case that the arbitrator had decided that the one party should recover so much and no more, it would have been sufficient. On the motion for the new trial, I thought the meaning of the arbitrator might be, that the plaintiff had no claim whatever for his out-door services: but, on further consideration, I think that that cannot have been his meaning;—wherehe intends to decide, he has used apt words for that purpose; for, in the first part of the instrument, he has expressed a decided opinion that the plaintiff had no claim for remuneration for the work done in the office under the circumstances in which he came into it; but, as to his services as an out-door clerk, it does not seem to me clear that he meant to decide that the plaintiff had or had not a claim to compensation.

TAUNTON J. The first part of this letter, in which the arbitrator says that the plaintiff is not entitled to make any demand for remuneration under the circum-

(a) *Ryan & M.* 17.

1833.

Lock
against
VILLIAMY.

stances in which he came to the defendant's office, is decisive on that point, and therefore, as to that, a good award; but the latter part, which relates to the services out of the office, contains no more than a suggestion on the part of the arbitrator to the defendant to meet the case liberally and pay 10*l*. That is not a decision that the plaintiff was or was not entitled to recover any thing in respect of those services. The arbitrator only submits it for consideration. As to those services, therefore, it was no award. The case is wholly different from *Matson v. Trower* (a). There the instrument did not contain a mere recommendation by the arbitrator, but a decisive opinion that the plaintiff was entitled to recover so much for breach of contract.

PATTESON J. concurred.

Rule discharged.

(a) *Ryan & M.* 17.

1833.

TIBBITS, Gent., One, &c., against YORKE.

Tuesday,
Nov. 12th.

DEBT. The first count of the declaration stated that the defendant, on the 18th of *January 1831*, was the proprietor of the tolls arising from the navigation of the river *Nene* in *Northamptonshire*, between *Oundle North Bridge* and *Thrapston Bridge*, and in the eastern division of the navigation of the said river from *Northampton* to *Peterborough*, mentioned in an act of 34 G. 3., which the declaration recited: that at a meeting of the commissioners of the said navigation, duly holden under and by virtue of the said act, on the 3d of *February 1830*, the said commissioners appointed the plaintiff their clerk: that he took upon himself the office, and executed the duties: that at a meeting of the commissioners on the 18th of *January 1831*, his accounts for attendance, labour, &c. were examined, and the amount of 174*l.* allowed, one moiety thereof to be paid by the proprietor or proprietors of the naviga-

A river navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person seised in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls, &c. to a trustee, to secure the annuities, and to permit her to hold the conveyed premises and the profits thereof to her own use, till default in payment of such annuities. By a subsequent

deed she conveyed the premises in fee to Y., together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation; and out of the several receipts and profits to defray the costs and expenses necessary for carrying the trusts into effect, to pay up, and, if possible, discharge the annuities, to pay off certain creditors, and to hold the surplus, if any, for her benefit.

The trustee under the last mentioned deed entered into receipt of the tolls, appointed a collector, and represented himself to the commissioners as a mortgagee of the tolls, and as having a control over them and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary:

Held, that it lay upon the trustee, having conducted himself as above stated, to shew that he was not a proprietor within the meaning of the act: Held, further, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee, to secure the annuities.

The act, passed in 1794, required that certain notices should be given in the *Northampton* and *Cambridge* newspapers. There was at that time one newspaper published at each place. A newspaper was subsequently established, called *The Huntingdon, Bedford, and Peterborough Gazette, and Cambridge and Hertford Independent Press*; and it was published (among other places) at *Cambridge*: Held, that publication of the notices in the former papers was sufficient.

1888.

—
TIBBITS
against
YORKE.

tion between *Oundle North Bridge* and *Thrapston Bridge*, of which the defendant, on, &c., had notice, and thereby, as such proprietor, became liable to pay, &c., and that he was, on, &c. requested to pay, but did not do so. The second count was similar; but the demand alleged was on *William Summers*, the defendant's agent. The third count stated, generally, that the defendant, as such proprietor, &c. was indebted to the plaintiff, as clerk to the said commissioners, duly elected by virtue of the statutes in such case, &c., in the sum of 87*l.*, the moiety of the sum of 174*l.* before then duly allowed to the plaintiff by certain of the said commissioners duly assembled, &c., the same being a reasonable sum for his attendance, labour, &c. as clerk, and to be paid to the plaintiff by the defendant so being the proprietor, &c. when he should be thereunto afterwards requested; whereby and by reason of the said sum of 87*l.* being wholly due and unpaid, an action had accrued, &c. The fourth count was on an account stated between the defendant as proprietor and the plaintiff as clerk, on which accounting the defendant as proprietor was found indebted, &c., whereby and by reason of the last-mentioned sum being unpaid an action, &c. Breach, that the defendant, although often requested, hath not paid, &c. Plea, nil debet. At the trial before *Little-dale J.*, at the *Northampton* Summer assizes 1881, the plaintiff had a verdict for 87*l.*, subject to the opinion of this Court on the following case:—

The commissioners, acting under three statutes, viz., 12 *Ann.* st. 2. c. 7. (private), for making the river *Nene* from *Northampton* to *Peterborough* navigable, and 11 *G. 1.* c. 19., and 34 *G. 3.* c. 85. for amending former enactments as to the said navigation, gave notice of a
meeting

meeting to be holden on the 3d of *February* 1830, for the purpose of electing a clerk. The notice was inserted in the *Northampton Mercury*, a newspaper printed and published at *Northampton*, and the *Cambridge Chronicle*, a newspaper printed and published at *Cambridge*. Besides these papers, which were established before the passing of 34 G. 3. c. 85., and were the only newspapers then printed or published at *Northampton* and *Cambridge*, there is another paper printed and published at *Cambridge*, which commenced in the year 1817, called *The Huntingdon, Bedford, and Peterborough Gazette, and Cambridge and Hertford Independent Press*, published at the offices at *Huntingdon, Bedford, Cambridge, and Hertford*; at the conclusion of which paper there is the following memorandum:—"Printed by the editor, *Weston Hatfield*, and published at the office, *Sidney Street, Cambridge*."

At the meeting advertised as above mentioned, the plaintiff was elected and appointed clerk to the commissioners acting in the eastern division of the said navigation, and a deed of appointment was executed in conformity with the order. The plaintiff performed the duties till the 18th of *January* 1831. The case further stated, that the Plaintiff had been appointed to the same office at a previous meeting, purporting to be a meeting of commissioners of the said navigation, viz., on the 20th of *October* 1829, at a salary to be fixed at a future meeting; and it set forth particulars with respect to the appointment of some of the commissioners who acted on that occasion, which it is unnecessary to state here.

At a meeting of the commissioners, appointed for the 4th of *January* 1831, and adjourned to the 18th, the

1833.

 TISSOTS
 against
 YORKE.

1833.

TIBBETTS
against
YORKE.

plaintiff produced his accounts and bill for business done. The bill was allowed, and an order made for payment of one moiety thereof by the defendant, as stated in the declaration.

About thirteen years ago, *William Summers* was by the defendant appointed collector of the said tolls on the navigation between *Oundle North Bridge* and *Thrapston Bridge*, for certain annuitants and creditors of *Elizabeth Cheyne* and *Dorothy Squire* as hereinafter mentioned, and has ever since collected and received the same, defraying from time to time, out of the amount thereof, the costs, charges, and expenses of the repairs of the said navigation, and the defendant from time to time settling the said *Summers's* accounts. There was a balance in hand of 230*l.* at *Christmas* last, and 75*l.* the preceding *Christmas*, after paying for the said repairs; and there is also a balance in hand at present; but the defendant never received any thing from tolls. The money goes in repairs.

At a meeting of the commissioners which took place subsequently to the appointment of the plaintiff as clerk, the defendant represented himself to be the mortgagee of the said tolls, but declared his determination not to obey any order of the said commissioners with reference to paying the plaintiff's salary, and alleged as a reason for such determination that the said tolls were insufficient completely to pay his interest and those repairs which he, the defendant, chose to have done.

By indentures of lease and release, *July 22d* and *23d*, 1782 (a copy of which accompanied the case), reciting that *Dorothy Squire* was then seised in fee of the said navigation between *Thrapston Bridge* and *Oundle North Bridge*, and of all and every the tolls, duties,

duties, and payments arising therefrom, subject to a rent-charge of 100*l.* a year payable to *Elizabeth Cheyne* during her life, the said *D. S.* and *E. C.* conveyed the said navigation, and the said tolls, &c., and all the profits, authorities, &c., arising out of the same, and also other real and personal property, to the defendant and to three other persons, creditors of *D. S.* and *E. C.*, upon trust to raise 7000*l.* by sale of the navigation and tolls, according to a contract stated to have been entered into with one *T. Squire*, and out of that sum and of the other property, and the debts and sums assigned by that deed, when received, in the first place to deduct and retain such costs and expenses as the trustees should necessarily be put to in or about the execution of the trusts, and afterwards (among other things) to apply the residue of the monies to be raised, in satisfying the annuitants, and paying the above three creditors, and such others as should execute the indenture (a). All the persons appointed trustees under the said deed are dead, except the defendant. The said deed was given in evidence by the defendant, and likewise two other deeds, one of the 27th and 28th of *November* 1778, and the other of the 23d of *April* 1779 (copies of which accompanied the case), whereby the said *D. S.* and *E. C.* granted to *Mark Sprot* and *Thomas Pitt Smith* certain rent-charges on the said tolls, &c., and conveyed the said tolls, &c. to one *William Smithson* for a term of lives and a term of ninety-nine years, in trust to secure the payment of those rent-charges, and to permit *D. S.* and her assigns to hold and enjoy the hereditaments and premises so charged, and receive the rents, issues, and

1833.

TIDBITS
against
YORK.

(a) See further as to the contents of this deed, p. 617. post.

1833.

TINNETT
against
YONGE.

profits to her and their own use, subject to the former rent-charge to *E. C.*, and until default of payment of the other rent-charges. All the annuitants mentioned in the said deeds are dead, but a considerable arrear of the annuities remains unpaid.

The following points were taken by the defendant:— First, that the notice given of the meeting of the 3d of *February* 1830 for electing a clerk was insufficient, being inserted only in the *Northampton Mercury* and *Cambridge Chronicle*, whereas there was at the time another newspaper published at *Cambridge*; and by 34 *G. 3. c. 85. s. 6.* such notice is to be given “in the *Northampton and Cambridge newspapers*, if any such shall be printed; if not, then in the *London Gazette*.” (The second objection was abandoned on the argument.) Thirdly, that the appointment of the plaintiff on the 3d of *February* 1830 was invalid, inasmuch as he had been already appointed at the meeting of the 20th of *October* 1829; and by 13 *Ann. st. 2. c. 7. s. 20.* no appointment of the commissioners is to be reversed or altered, unless the whole, or the majority, of the commissioners who made such order shall have notice of the meeting for the purpose of reversing or altering the same, which did not appear to have been given in the present instance. Fourthly, that the defendant was not a proprietor (a) of the tolls; that the deeds of lease and re-lease

(a) By 34 *G. 3. c. 85. s. 7.* it is enacted, that one moiety of the money to be allowed to such clerk shall be paid by the proprietor or proprietors for the time being of the tolls and duties arising from the said navigation between *Peterborough* and *Oundle North Bridge*; and the other moiety thereof by the proprietor or proprietors for the time being of the tolls and duties arising from the said navigation between *Oundle North Bridge* and *Thrapston Bridge*.

lease of *July* 1782 shewed him to be a trustee on behalf of the creditors of the proprietors, *Cheyne and Squire*; three of the parties to the said release of the third part being such creditors, acting for themselves and others of the said creditors, and as trustees for the purposes in that deed specified; and the parties of the fourth part being such of the other creditors as should execute the said indentures. Fifthly, that the legal estate in the navigation was outstanding in the representatives of the mortgagee under the deeds of 1778 and 1779, and a considerable amount of the arrears remained unpaid; and that the trustees under the deed of 1782, (of whom the defendant was the survivor), had only the equity of redemption in the navigation.

1833:

 TIDBITS
 against
 YORKE.

Miller, for the plaintiff, was desired by the Court to confine himself to the question, whether or not the defendant was a proprietor. The "proprietors," who by 34 G. 3. c. 85. s. 7. are to pay the clerk, are the same persons with the "undertakers" mentioned in 13 Ann. st. 2. c. 7. s. 1.; and the latter, by that clause, are the person or persons (approved and appointed by the commissioners) who are to make the river navigable, to build locks, &c., "where they the said undertakers, their heirs and assigns, shall think fit," and to do all other necessary matters and things for the improvement and maintaining of the navigation. The act 34 G. 3.

Sect. 9. enacts, that if any or either of the proprietors of the said tolls and duties shall neglect or refuse to pay the sums allowed and due to the clerk, on demand made of such proprietor or his agent who receives the tolls, such sums may be recovered by action of debt in the name of such clerk, against the proprietor of such tolls or duties who ought to pay the same under the directions of this act; and that if such proprietor cannot be found, the action may be brought against his agent in the receipt of the tolls.

c. 85.

1833.

 TIBBITS
 against
 YORKE.

c. 85. s. 1. expressly speaks of the said “undertakers,” —“being the proprietors of the respective parts of the said navigation;” and section 2. continues the powers, &c. granted by the former act, except as they are repealed by this. The defendant therefore comes under the description of a proprietor within the meaning of the statutes. And, as the surviving trustee under the deed of 1782, who alone has a right to receive the tolls on the line of navigation in question, he is substantially the proprietor. The transactions of *Summers*, his admitted agent, the statement of the defendant himself to the commissioners that he was mortgagee, and his other declarations on the same occasion, shew clearly the situation in which he stands. If he is a proprietor for the purpose of receiving the profits and regulating the expenditure on repairs, he is so for that of paying the clerk.

Follett contra. It is not clear from the statutes, that the proprietors of the tolls are the same persons with the proprietors or undertakers of the navigation; and assuming that they are so, the plaintiff here does not trace his title from any of the persons recognised by the act of 34 G. 3. *c. 85.* as “undertakers, being the proprietors,” of the navigation. The alleged acts or admissions of the defendant are not conclusive, if, upon reference to the deeds under which he has taken the tolls, it does not appear that he is a “proprietor” within the meaning of the acts. The result of the several deeds is, that the defendant merely had what may be termed the equity of redemption of the property, and that not for his own use but for the general benefit of the persons mentioned as creditors and incumbrancers

in

in the deed of 1782. It was not a matter of necessity that the action should have been brought against the defendant; for, by section 9. of 34 G. 3. c. 85., if the proprietor cannot be found, the agent who receives the tolls may be sued. The formal objection with respect to the notices in the newspapers is also valid. The words of the act do not import that such notices shall be given in a part only of the *Northampton* and *Cambridge* papers. [*Patteson J.* There were only two such papers when the act passed.] Supposing both of those had been discontinued and others established, the notices must then have been given in papers which were not extant when the act passed.

Miller in reply. The plaintiff is not bound to trace the defendant's title to any proprietor or undertaker. He is entitled to insist on the liability of the defendant under the deed of 1782, which he has himself put in. In executing the trusts of that deed he must, at all events, pay the expenses of the navigation, and, among others, the clerk's bill. [*Patteson J.* There is no appropriation clause in any of the acts.]

DENMAN C. J. The real question in this case is, whether the defendant is proved to be a proprietor of that part of the *Nene* navigation which lies between *Oundle North Bridge* and *Thrapston Bridge*. It is stated in the case that, about thirteen years ago, this defendant appointed a person to be collector of the said tolls. [His Lordship here read the paragraph of the case as to the employment of *Summers*, and the account rendered by him to the defendant; and also that part which stated the representation of the defendant that he was mortgagee, his refusal to pay the plaintiff's salary,

1833.

TIBBITS
against
YORKE.

1838.

TIBBETTS
against
YORKE.

salary, and the reason assigned by him.] Now, the clerk being appointed by the commissioners in a manner which is free from objection, and having done certain things for these commissioners, he had, by 34 G. 3. c. 85. s. 7., to look for his remuneration to the proprietors of this part of the navigation; and supposing there was nothing more in the case than that the defendant had represented himself to have the power of appointing a collector, and received the tolls, and dealt with and controlled them, in the manner stated, it appears to me that that would be sufficient to maintain this action, as between the clerk, who under the act of parliament looks for his remuneration to the proprietors, and this defendant, who represented himself by his conduct as such proprietor. But then it is said, there is nothing to shew, in point of fact, that he was a proprietor, and that the deeds disprove it. Now I am not quite sure we have all the deeds before us, and there certainly is a great deal of confusion in this respect. But supposing that the deeds present the case correctly, then it seems to me that within the meaning of the act of 34 G. 3. c. 85., and for the purpose of paying the persons employed in the execution of the works, among whom the clerk of course is a very essential person, the defendant may be very properly considered a proprietor; because by the deed of 1782, which he appears to have executed, he is appointed to receive the tolls and to hold the navigation and the profits arising therefrom, subject to certain claims; and he is to act as trustee in the disposal of the monies so arising: he is to do what is just with them, to pay the parties employed in the works, to pay interest to other parties, and to exercise control over the repairs which are to be done. I think that by that deed, and by the possession he has taken

taken and the control he has exercised, under it, he must be considered as a proprietor. I never can hold that a party employed as the plaintiff was, by a person acting as the defendant has done, shall be bound to ascertain with nicety where the legal estate lies, to balance the equities, and to find out who has in the greatest degree the beneficial interest in the property. If he finds a party invested with such an authority as was given by this deed, and adopting it by his acts, I think he is justified in treating him as a proprietor; and that the defendant is so, under the statute, for the present purpose.

1838.

 TIBBATS
 against
 YORK.

PARKE J. I am of the same opinion. In this case several objections have been taken. The first is, that the plaintiff was not duly appointed clerk, because he had been appointed at a previous meeting to that alleged in the special counts in the declaration, viz. in the year 1829. That objection, however, has been disposed of, and it is clear in my mind that the plaintiff is entitled to recover under the general counts in the declaration, provided the defendant be a proprietor: if he is the clerk to the commissioners, whether he was appointed at a meeting in 1829 or the one in 1830, is wholly immaterial. There is another objection, which applies only to the meeting of the 3d of *February* 1830, viz. that that meeting was not duly advertised in the *Northampton* and *Cambridge* papers. It does not appear to me to be necessary under this act of parliament that there should be an advertisement in every paper published at those places; but supposing it was requisite, I am not satisfied, looking at the title of the paper, that this paper printed and published at *Cambridge* is a *Cambridge* paper within the meaning of the acts of parliament. The plaintiff, therefore, is the clerk to the

com-

1833.

 TIBBITS
 against
 YORKE.

commissioners; and they having adjudicated that he is entitled to a sum of money to be paid by the proprietor of the tolls in question, the point comes to be: Who is the proprietor of those tolls?

Now with respect to the title to the tolls, it appears that they were vested in Mrs. *Squire*, subject to an annuity of 100*l.* payable to Mrs. *Cheyne*: that in 1778, there was a grant of annuity made by Mrs. *Squire* and Mrs. *Cheyne* to two annuitants, Mr. *Sprot* and Mr. *Smith*; and, in order to secure these annuities, there is a grant of all *Squire's* and *Cheyne's* interest in the tolls to Mr. *Smithson* for a term of lives, and of 99 years. The effect of that deed would be that the legal estate vested in *Smithson*, and that if the plaintiff had had to bring an action against the owner of the legal estate, his remedy would have been against *Smithson*, and not against the defendant; but it appears to me quite clear that the meaning of the act of parliament is not that. Supposing that no other deed had been executed but this grant of annuities, and that the trustee had not taken possession for the term granted to him, then if Mrs. *Squire* and Mrs. *Cheyne* had still continued in receipt of the profits of the navigation, doing all the repairs and paying all the expenses, they, notwithstanding the existence of the mortgage charge, would unquestionably have been the proprietors of the navigation within the act, 34 G. 3. c. 85. They would have been the persons in the receipt of the rents and profits, and one application of these is to do the repairs of the navigation, and another application, equally necessary, to pay the expenses of the clerk appointed under the navigation acts. It being then clear that Mrs. *Squire* and Mrs. *Cheyne*, in the case supposed, would be the responsible persons, notwithstanding the grant of annuities, which

is

is merely a charge on the profits affecting the legal estate, let us see the effect of the deed of 1782. That deed does not recite the charge of 1778, but another indenture of 1781; and it is perfectly clear to me that this deed of 1778 had been done away with, and for the two annuities of 100*l.* each to *Sprot* and *Smith*, there had been substituted an annuity of 180*l.* to *Sprot* and 170*l.* to *Smith*. No doubt there had been some further advance in the mean time. There is besides a further grant of annuity by bond not secured on the tolls, to a *Mrs. Palmer*. This deed also recites that there had been a contract entered into between *Mrs. Squire* and *Mrs. Cheyne* and *Thomas Squire* to sell the whole of the tolls for 7000*l.* Then what are the trusts of this deed? They are, in the first place, to carry into effect the contract, in the next place to sell some other real estate conveyed by this deed, and in the third place to sell all the personal property of *Mrs. Squire* and *Mrs. Cheyne*, all being vested in the trustees: they are to receive the 7000*l.* under the contract with *Squire* (which however did not take effect); and out of that sum, and the profits to arise from the sale of other property, and out of the tolls, which the trustees are also to receive, to pay all the costs, charges, and expenses necessary for carrying the trusts into effect. The repairs of the navigation are one part of these charges and expenses, and the payment of the clerk's allowance is undoubtedly another. Having paid these several charges and expenses, their next duty is to compound with the annuitants if they can, at all events to keep them off the estate, and prevent its being burthened with them, and to pay the creditors; and then, if there is any surplus, to hold it in trust for *Mrs. Squire* and *Mrs. Cheyne*. The effect of that deed is to put the

1833.

 TIBBITS
 against
 YORKE.

trustees in the same situation as Mrs. *Squire* and Mrs. *Cheyne* would have been in, if they had continued in possession; and the whole estate which they had, subject to the mortgage charge, is vested in the defendant, the defendant being the survivor of these trustees. No other person can be said to have a distinct equitable title to the estate. He has to receive the profits to pay off the incumbrances, to enter into such contract as he thinks fit with the annuitants, and to pay the different creditors: the effect of the deed is to place him, clear of these liabilities, in the same situation as Mrs. *Squire* and Mrs. *Cheyne* would have stood in, supposing the deed had never been executed at all. We cannot attend to the circumstance of an outstanding legal estate being in another person in trust to secure the annuities. It appears to me, therefore, that the defendant must be treated as the proprietor of these tolls, and if so, that this action is maintainable.

TAUNTON J. I am of the same opinion: and, my brother *Parke* having gone so minutely into the different conveyances, I do not think it necessary to enter particularly into the intricacies of these deeds. The act of parliament provides that the clerk shall be paid by the proprietor of the tolls; and I am of opinion that the defendant may be treated as the proprietor so as to be liable in this action, because he has held himself out to the world as such, and has done various acts which no other person but a proprietor was competent to do. For instance, he has stated that he would only pay for such repairs as he himself should order to be done, thus assuming himself to be the person who had the power of controlling the expenditure, and directing the repairs. He has also appointed a person to collect the tolls;

tolls; he has checked the accounts of that person, and the collector under his authority has paid the current expenses of the navigation. I do not mean to say that these various acts would, at all events, make him liable as a proprietor under the act; but I think they throw upon him the burthen of proving that, notwithstanding he has been the visible and ostensible proprietor, yet the real proprietor is some other person. Has he done this? The only other person whom there is any pretence for calling the proprietor is the representative of *Smithson*, under the deeds of 1778; but, although the legal estate passed to *Smithson* for the purpose of securing the annuities mentioned in the deed, still those annuities were only a charge upon the estate: the legal estate was not given to *Smithson* in the character of proprietor of the navigation in the sense in which the word "proprietor" appears to me to be used in the act, but merely to secure these annuities. I think, therefore, the legal title outstanding in *Smithson's* representative is no bar to this defendant being considered a proprietor within the act. Then, by the deed of 1782, the whole interest is conveyed to the defendant and three other persons whom he has survived, subject to the terms granted to *Smithson*; every thing except that which was outstanding in *Smithson* is conveyed to them, and the trusts are to pay the creditors, and defray the expenses of the navigation and the general charges incident thereto. We are not running counter to the declared objects of that deed in saying that the defendant is liable to the charge now in question. And, looking at all the deeds, there is nothing to shew that, although Mr. *Yorke* may have been the ostensible proprietor, some other person remains concealed, who

1833.

 TIMMS
 against
 YORKE.

1833.

 TIBBETS
 against
 YORKE.

ought to be considered the real proprietor. I think, therefore, that enough appears to support the present action.

PATTESON J. I am entirely of the same opinion. The formal objections are clearly answered; and the only question is, what is the meaning of the word "proprietor" under the act of parliament? The argument, that a person, to be such proprietor, must have the legal estate, appears to me wrong; I think the word proprietor is not used in that strict sense in the act. The facts are, simply, that Mrs. *Squire* having an interest in the tolls, grants annuities to two persons in 1778, and for the purpose of securing these annuities she leases the tolls to *Smithson* for life and for ninety-nine years. In 1779 she grants two further annuities by another deed to the same persons; and it is clear there must have been a subsequent deed in 1781, which is not set out in the case, by which the four annuities are consolidated; for such a deed is recited in the deed of 1782. Under that deed of 1782 the defendant takes all the interest that was left in Mrs. *Squire*. She certainly must be considered to have been a proprietor of these tolls, though she had granted a lease of them for securing the annuities: it was, in fact, merely a charge upon the tolls: in substance she was a proprietor. Why, then, is not the defendant, who takes all her interest, a proprietor? He is, in truth, the proprietor of the tolls, taking them for her benefit, and to distribute among her creditors, and having the equitable interest vested in him for that purpose. The case seems to me to come directly within the meaning of this act of parliament.

Judgment for the Plaintiff.

1833.

DOE dem. JOHN ANDREW GALLINI *against*
FRANCIS ALBERT GALLINI.

EJECTMENT for manors, lands, &c. in the county of *Berks*. Plea, not guilty. At the trial before *Bosanquet J.*, at the Summer assizes for the county of *Berks*, 1832, the jury found a special verdict, stating as follows:—

Sir *John Andrew Gallini*, Knight, being seised in fee simple of the manors and other hereditaments, one fifth part whereof is sought to be recovered by the lessors of life; and also, upon trust, during the lives of his said children, to preserve contingent remainders:

And after the decease of any or either of his said children, he devised the estate to him or them limited for life as aforesaid, unto all and every his, her, or their child or children living at the time of his, her, or their parents' decease, or born in due time afterwards, for their lives as tenants in common; but, nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one, and any of them should die without leaving issue, the child or children of each of his said sons and daughters taking the rents and profits of his, her, or their parents' estate only:

And from and after the decease of all the children of each of his said sons and daughters *without issue*, he devised the estates to them respectively limited as aforesaid, unto and among all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining:

And for default or in failure of issue of any of his said sons and daughters, he devised the estates so limited to him, her, or them dying *without issue*, unto the survivors of his said sons and daughters, during their respective lives, in equal shares as tenants in common; and after their respective deaths he devised the same to the children of the survivor of his said sons and daughters, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters:

And for default or in failure of issue of all his said sons and daughters except one, he devised all his said estates unto his only surviving son or daughter in fee.

Held, that under this will, the eldest son of the testator did not take an estate tail (unless in remainder), but an estate for life; that his children took estates tail in undivided shares, as tenants in common.

The doctrine that, in construing a devise, the general intent is to be preferred to the particular intent, is incorrect and vague; the true rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator use inconsistent words; unless the inconsistent words are of such a nature as to make it clear that the technical words are not used in their proper sense.

1833.

DOX dem.
GALLINI
against
GALLINI.

the plaintiff in this action, duly made and published his last will and testament in writing, bearing date the 19th day of *October* 1799, and thereby devised unto certain trustees and their heirs, all his manors, farms, lands, tenements, and hereditaments situate at *Yattenden* or elsewhere in the county of *Berks*; also two messuages in *Hanover Square* in the county of *Middlesex*, in the several occupations of *Dr. Osborne* and *William Mainwaring*, with the appurtenances; and also his estates in *France*, therein described; habendum to the uses or upon the trusts, and for the intents and purposes therein after expressed; that is to say, as for and concerning his manors, lands, &c. in the county of *Berks*, upon trust to permit his son *Francis Cecil Gallini* to receive the rents, issues, and profits thereof (except certain timber) for his natural life, his said son thereout paying or providing for the maintenance, support, and necessities of testator's wife *Lady Gallini*, for her life; and as for the messuage in *Hanover Square*, in the occupation of *W. M.*, upon trust to permit testator's daughter *Jesse* to receive the rents and profits for her life; and as for the messuage in *Hanover Square*, in the occupation of *Dr. Osborne*, upon trust to permit testator's daughter *Louise* to receive the rents and profits for her life; and as for his estates in *France*, upon trust to permit his son *John* to receive the rents and profits for his life, subject to interest on the mortgage thereof. The will then proceeded as follows:—

“ And from and after the determination of the several and respective estates of my said sons and daughters of and in the said manors, farms, lands, messuages, tenements, and hereditaments in *England*, and the said estates

estates in *France*, I give and devise the same estates unto the said trustees and their heirs during the several lives of my said children, upon trust to preserve the contingent remainders hereinafter limited from being defeated or destroyed, &c.; but nevertheless to permit and suffer my said sons and daughters to receive and take the rents, issues, and profits of the several estates devised in trust for them respectively for and during their natural lives (except in case of the forfeiture hereinafter declared): And from and immediately after the decease of any or either of my said children *Francis, Jesse, Louise, and John*, or in case of such forfeiture, I give and devise the estate or estates to him, her, or them respectively limited for life as aforesaid, unto and among all and every, his, her, or their child or children lawfully begotten, *which shall be living at the time of his, her, or their decease*, or born in due time afterwards, for and during their natural lives, as tenants in common and not as joint tenants; but nevertheless with an equal benefit of survivorship among the rest of the said children, if more than one, and any of them shall die *without leaving issue*; the child or children of each of my said sons and daughters taking the rents and profits of his, her, or their parent's estate or estates only: And from and after the decease of all the children of *each* of my said sons and daughters *without issue*, I give and devise the estate or estates to them respectively limited as aforesaid unto and among all and every *the lawful issue of such child or children* (during their lives) as tenants in common, and to descend *in like manner to the issue of my said sons and daughters respectively* so long as there shall be any stock or offspring remaining; And for default or in failure of issue of any of my said

1833.

DOX dem.
GALLINI
against
GALLINI.

1833.

—
DOR dem.
GALLINI
against
GALLINI.

sons and daughters, I give and devise the estate or estates so limited to him, her, or them dying without issue, unto the survivors of my said sons and daughters during their respective natural lives, in equal shares as tenants in common, subject to the forfeiture hereinafter declared; and after their respective deaths, I give and devise the same to the children of the survivor of my said sons and daughters during their respective lives as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the *issue* of such children in like manner as I have before devised the original estate of each of my said sons and daughters; and *for default or in failure of issue of all my said sons and daughters except one*, I give and devise all my said freehold estates unto my only surviving son or daughter, to hold to him or her, and his or her heirs and assigns for ever."

"Provided always, and I do hereby declare it to be my will, and direct, that my said sons and daughters, or any of them, or any of their issue, shall have no power or authority whatsoever, either at law or in equity, by virtue of this my will, or the trusts thereof, to bargain, sell, assign, release, or convey their respective interests in my said freehold estates for their respective lives, or any other term, right, or interest therein, either by way of sale and purchase, mortgage or otherwise, neither shall any annuity, yearly rent-charge, or any other sum or sums of money whatsoever be granted, assigned, or made payable out of the said freehold estates, or any parts or shares thereof to which they may become eventually entitled, or the rents and profits thereof, or any part thereof, by my said sons and daughters, or any or either of them, or the issue of any or either of them, to any person

person or persons whomsoever, for their respective lives, or any shorter term therein, for any sum or sums of money, or any other consideration, or upon any other account, or in any other shape or manner whatsoever; and in the event of any of my said sons and daughters, or the issue of any of them, doing or suffering any thing to be done contrary to the true intent and meaning of this my will, I do hereby declare that their estate and interest of and in the said manors, farms, lands, messuages, hereditaments, and premises shall cease and determine and be immediately forfeited." The testator gave the trustees, and also his said sons and daughters, power of leasing for twenty-one years, upon the terms in the will mentioned; and he devised the timber above mentioned to the trustees, upon certain trusts declared in that behalf.

The testator died on the 5th of *January* 1805. On a trial at law in *Trinity* term 1807, on an issue directed by the Court of Chancery, a verdict was found in favour of the will; and by a decree of the said Court, dated the 1st of *August* 1810, it was declared that the said will ought to be established. There was issue of the testator living at the time of his decease, *Francis Cecil Gallini*, in the said will called *Francis Cecil Gallini* his eldest son and heir at law, and two daughters, *Jesse* and *Louise*. *John Gallini* and Lady *Gallini* died in the lifetime of the testator. At the time of the testator's decease there was lawful issue of the said *Francis C. Gallini* living, viz. *John Andrew Gallini*, the lessor of the plaintiff, and eldest son of the said *Francis C. Gallini*; *Mary Gallini*, *Arthur Gallini*, and *Frances Ann Penelope Harriet Gallini*.

Francis

1833.

DOE demt.
GALLINI
against
GALLINI.

1893.

—
DOR dem.
GALLINI
against
GALLINI.

Francis Cecil Gallini died on the 19th of *May* 1815, intestate as to the real estates, leaving issue, the said *John Andrew Gallini*, and the said *Mary Gallini*, and *Arthur Gallini*; and also the defendants *Alfred Lambert Gallini*, and *Francis Albert Gallini*, and they have all since attained the age of twenty-one years. *Frances Ann Penelope Harriet Gallini* died under age in the lifetime of her father.

The said *Jesse Gallini* and *Louise Gallini* are both living unmarried and without issue.

The premises comprised in the declaration in ejectment are the premises in the county of *Berks* devised by the will of the said Sir *John Andrew Gallini*. *Francis Cecil Gallini*, the testator's eldest son, was in possession of the *Berkshire* estates under the said will at the time of his decease.

The lessor of the plaintiff is the heir at law of *Francis Cecil Gallini* and of the testator, and also heir of the body of the said *Francis C. Gallini*, and attained the full age of twenty-one years on the 13th of *March* 1822, when under an order of the Court of Chancery he was put into and has ever since been in possession and in the receipt of the rents and profits of one undivided fifth part of the said estates.

Under another order of the said Court of Chancery the defendant *Francis Albert Gallini* was on his attaining the age of twenty-one years, namely, on the 17th of *January* 1827, put in possession and receipt of one other undivided fifth part of the said estates, claiming to be entitled thereto under the said will, and still is in possession of the same. The ejectment is brought to recover the said fifth part of the estates in

Berks

Berks so in possession of *Francis Albert Gallini*. Such possession by him has been and is adverse to the lessor of the plaintiff.

1833.

DOX dem.
GALLINI
against
GALLINI.

On the 14th of *May* 1832, the lessor of the plaintiff made an actual entry upon all the devised premises in *Berkshire*.

The case was argued in *Trinity* term 1833 (*a*).

Lynch for the lessor of the plaintiff. The testator's object was twofold. First, to continue his estates in his descendants from generation to generation while any of the stock should remain. This was a legal object. Secondly, to continue them so that his descendants should take for their lives only from generation to generation. That was an illegal object. The devisees, from whom stocks were to arise, are the sons and daughters. The testator gives them only an estate for their lives; and it is not to go over to the ultimate devisee until there is a total failure of their issue. The result in law is, that the sons and daughters took estates tail. That construction is necessary to effect the legal and paramount intention of the testator. The general rule is, that where an estate is devised to a person for life, with a devise over which is not to take effect while there is any issue of the devisee for life, if there be no words in the will under which the issue can take as purchasers, then, in order to carry the manifest general intent of the testator into effect, the particular intent is disregarded, and the estate devised for life is enlarged into an estate tail, so as to let in all the issue of the first devisee: *Robinson v. Robinson* (*b*), *Doe v. Applin* (*c*),

(*a*) Before *Denman C. J.*, *Littledale*, *Parke*, and *Patteson J.*s.

(*b*) 1 *Burr.* 38. 2 *Fes.* 225.

(*c*) 4 *T. R.* 82.

1833.

DOE dem.
GALLINI
against
GALLINI.

Jesson v. Wright (a), Doe v. Smith (b), Doe v. Cooper (c), Bennett v. Lord Tankerville (d), Wood v. Baron (e), Frank v. Stovin (g), Pierson v. Vickers (h), Doe v. Harvey (i). Nothing can be more striking than the different modes of disposition made use of by testators to carry their intentions into effect. But for the doctrine that the particular intent was to yield to the general intent, it would have been impossible that all of these decisions should be as uniform as they have been. To carry into effect the general intent, the particular disposition has been disregarded. Let this principle be applied to the present case. The intention of the testator, that the estate should not go over until a general failure of issue of his sons and daughters, can only be carried into effect by giving the sons and daughters an estate tail. It is settled by the decisions, that when the intention of the testator appears to be to provide for all the lineal descendants of the devisee, and that the estate is not to go over until a total failure of the issue of such devisee, the devisee shall take an estate tail notwithstanding the inaptitude of the words used for that purpose. Particular expressions used by the testator, which might have the effect of counteracting the general object; dispositions made by him, militating against that object; modifications endeavoured to be introduced by him into the descent; have all been overlooked in favour of the general intention. It will be contended in this case, that the surviving sons and daughters of *F. C. Gallini* take estates tail. In answer to this,

(a) 2 *Bligh*. 51.(c) 1 *East*, 329.(e) 1 *East*, 259.(h) 5 *East*, 548. 2 *Smith*, 160.(b) 7 *T. R.* 531.(d) 19 *Ves.* 170.(g) 3 *East*, 548.(i) 4 *B. & C.* 610.

it is only necessary to say that the words of the will do not warrant such a construction; for the estates given to the grandchildren surviving, are only given for their lives; as in like manner, the estates to the sons and daughters are only given for their lives. Besides, suppose a son to have died in the lifetime of the testator, and to have left issue, that issue, according to the construction contended for on the other side, would be disinherited. The general intention, therefore, cannot be effected except by holding that the sons and daughters of the testator took estates tail. The words "without issue," in the devise to the grandchildren, after the death of their parents, must be rejected as insensible; for the testator afterwards directs that the estates are to descend to the issue of such child or children during their lives, and so on to the issue of his sons and daughters, so long as there shall be any stock or offspring remaining; and for default of issue of his sons and daughters, he gives the estates so limited to him, her, or them dying without issue unto the survivors of his sons and daughters for life, in equal shares as tenants in common, and after their death to the children of the survivors during their lives, as tenants in common; and after the decease of all of them, to the issue of such children. The words "*without issue*," in the devise to the grandchildren, if retained, must be read as if they were "leaving issue;" and then the effect will be that the estate left to each of the sons and daughters will go to the whole line of issue of those sons and daughters respectively, and only on failure of that issue go over. The word *issue* there must be construed as a word of limitation. Unless it be so construed, the bequest over to the issue will be too remote. A devise to the children of

1833.

DOX dem.
GALLINI
against
GALLINI.

1833.

Doct. dem.
GALLINI
against
GALLINI.

of the sons and daughters unborn in the lifetime of the testator would be void, *Jee v. Audley* (a), *Leake v. Robinson* (b); and if that limitation be too remote, every other limitation is so. At all events, the words "without issue," when applied to the grandchildren surviving, ought not to have a greater effect in enlarging their estates to estates tail, than the same words when applied to the sons and daughters in the subsequent part of the will. Give the words "without issue" that effect when applied to the sons and daughters, and no descendant will be disinherited, and the general object of the testator will be carried into effect. This case is not distinguishable from *Murkwaite v. Jenkinson* (c), and *Wollen v. Andrewes* (d). In the first of those cases, the devise was to the testator's three nieces equally for their respective lives, and after the decease of each, the lawful issue of each to have his or her mother's share for life in like manner, and if either of the nieces should die in the lifetime of the others or other of them without issue, her share was to go equally to the survivors for their lives, and afterwards to the lawful issue of the survivors in like manner; and if all the others and their issue save one should die without issue, then the survivor was to have the whole for her life; and after her decease, the lawful issue of such surviving niece, if more than one, to have the whole equally; and if but one, then such one should have the whole of such part as was personal to his or her own use; and to hold such part as freehold to them, and each of them, if more than one, their and his or her heirs and assigns as tenants in

(a) 1 Cox, 324.

(c) 2 B. & C. 357.

(b) 2 Mer. 365.

(d) 2 Bing. 126.

common; if but one, then to such one, his, or her heirs' and assigns for ever. The Court of King's Bench decided that, if the devise had been of the legal estate, the three nieces would have been tenants in tail. They also held that there were cross remainders in tail among the nieces; and it was decided that an only child of one of the nieces, if he survived his mother and two aunts, and they should have no other child, would be tenant in tail of the freehold. In *Wollen v. Andrewes* (a), the words *child or children* are used in the gift to the grandchildren, as in this will, and the gift to them is for life only, with a gift over in like manner to their children, and the estate tail was raised on the gift over to the other children of the testator in the event of any of his children dying without issue. *Mortimer v. West* (b) is also a case nearly resembling the present.

1833.

DOE dem.
GALLINI
against
GALLINI.

Talfourd Serjt. for the defendant *A. Gallini*.

The lessor of the plaintiff cannot succeed unless he satisfy the Court that *Francis*, the eldest son of the testator, took an estate tail. It is sufficient for the defendants to establish that this is not so. But the construction they contend for is, that the named sons and daughters of the testator took respectively estates for life in the several premises devised to them, with remainders in tail to their children who should survive them respectively, with cross remainders in tail among their respective issue. The first step towards arriving at the true construction of the devise is to disentangle it of the confused terms in which it is couched. It is obvious that there is something omitted

(a) 2 Bing. 126.

(b) 3 Sim. 274.

1833.

Dox dem.
GALLINI
against
GALLINI.

or inserted by mistake, or some words used out of their ordinary grammatical construction. Now, first, it may be fit to refer to the parts of the will preceding the clause on which the question arises. The testator, having devised all his estates to trustees in terms sufficiently large to give them a fee, proceeds to designate the parties in whose favour the devise is made. He first gives to his son *Francis* an estate in *Berkshire*, to his daughters *Jesse* and *Louise* estates in *Hanover Square* respectively, and to his son *John* an estate in *France*, in terms which clearly denote only estates for life, unless by legal implication they are enlarged into estates tail. He next interposes a trust estate to preserve contingent remainders, thereby strongly confirming his intention to give to his sons and daughters, whom he has named, estates for life only. Then, in case of the death of any of his named children, or the forfeiture of their estate, he gives the estates, limited to them for life, to the children of each who shall be living at the time of the parent's decease, or born in due time afterwards, — estates, in terms, for life only, in the premises antecedently devised for life to their respective parents; all such children to take as tenants in common, with benefit of survivorship if any one shall die *without leaving issue*. The words “without leaving issue” will probably enlarge the estate of these the deviser's grandchildren, who have survived their parents, into estates tail. So far there is no obscurity or legal difficulty. But the next clause proceeds, — “And from and after the decease of all and every the children of *each* of my said sons and daughters without issue.” The question is, what the word *each* means here; — it cannot mean if all the children of each of his sons and daughters shall die

die without issue, then the lawful issue shall take, for the race would be extinct. But *each* must be read distributively; as, "any," or, "either." Then it will read thus:—"And from and after the decease of all the children of any of my said sons and daughters without issue, I devise the estate or estates to them respectively limited as aforesaid, unto the lawful issue of *such* child or children." But the word *such* cannot refer back to the children who have died without issue; it must have relation to something subsequent, and it must be read as implying "as shall have issue," thus providing for the cross remainders among the issue of the respective children, and so on for all time. The first takers then have estates for life, with remainder to their surviving children in tail, with cross remainders in tail among the issue of each of the grandchildren. It is observable, that in speaking of the grandchildren the testator uses the term *children*, which is a word of purchase, whereas, in speaking of the succeeding generations, he uses the term *issue*, which is a word of limitation.

The difficulty in the way of the present construction is, that the testator has followed out the grandchildren before he has provided for the death of the children without issue. But his mind, carried beyond its immediate purpose, now reverts to it again. He provides for the failure of issue of either of his sons and daughters, by devising the estates of those *dying without issue* to the survivors during their respective natural lives, in equal shares, as tenants in common. "And after their respective deaths, then *to the children* of the survivor:" that must mean survivors. Then to the *issue* of the children. And for default of issue of all except *one*, then to the sole

1833.

Don dem.
GALLINI
against
GALLINI.

1833.

DOE dem.
GALLINI
against
GALLINI.

survivor of all for ever. The words "dying without issue" may be resorted to to enlarge the estate of the first takers; but that is not their meaning here. Looking to the whole will, the term "dying without issue" must mean "dying without such issue." *Ginger dem. White v. White (a)* and *Blackborn v. Edgeley (b)* shew that "without issue," may mean "without such issue." In *Morse v. The Marquis of Ormond (c)*, the words "after failure of issue" were construed to mean "the failure of the issue aforesaid." If the words *without issue* are so read here, the limitation contended for on the other side fails. But supposing the expressions relied on denote an estate tail, it does not follow that this is an estate tail in *Francis* in possession, to the effect of entirely defeating the gift to his children as tenants in common. Suppose one object of the testator was to embrace all the issue of *Francis*, without defeating the express estates given to the children of *Francis* who should be living at the time of his death and their issue, this object may be effected and under these terms, by giving to *Francis* an estate tail in remainder, expectant on the determination of the estates tail to such of his children as may survive him. To hold that the first takers take an estate tail in remainder removes the difficulty suggested in case of a son dying in the lifetime of the testator.

This case is distinguishable from *Murthwaite v. Jenkinson (d)* and *Mortimer v. West (e)*, because, here, the intention of the testator is to provide for the *children of* his children who should be living at the time of their parents' death. In the former case, it is obvious that the

(a) *Willes*, 348.(c) 1 *Russell*, 382.(e) 2 *Simons*, 274.(b) 1 *Peere Williams*, 600.(d) 2 *B. & C.* 357.

nieces were the *stirpes* from whence the issue was to spring; and to them, therefore, an estate tail was given by implication, on account of a devise over on failure of issue. In this case, it is equally obvious that the children of the first takers, living at the time of their parents' deaths, are the *stirpes*. All the arguments in *Murthwaite v. Jenkinson* tend to shew not an estate tail in *Francis*, but in the children of *Francis*, who are in the situation of the nieces. So in *Mortimer v. West* (a), the relative position of the children of *Martha Davies*, who were held to take estates tail, is not to the first takers here, but to the present defendants. The first devise there, is to trustees for the life of *Martha Davies*. *Martha Davies*, then, stands for *Francis*; and then the trust is after her death and that of the testator's wife, to pay and divide the rents among the named children of *Martha Davies*, or such of them as shall be living at the time of the testator's decease, or born, &c., share and share alike for their several lives; and from and after the decease of every of the said children *leaving issue*, the limitations are as in the present case. In construing a will, the paramount intent is to guide, but the rule also is, (as laid down by Lord *Redesdale* in *Jesson v. Wright* (b),) "that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise."

Coote was also heard for *Alfred Lambert Gallini*, who was defendant in another case in which a similar verdict had been taken. The rule is, not that the particular intent shall be sacrificed to the general intent, but that

1838.

Doct. dem.
GALLINI
against
GALLINI.

(a) 2 *Simons*, 274.(b) 2 *Bligh*, 57.

1893.

DOE dem.
GALLINI
against
GALLINI.

the general intent shall be carried into effect, having regard to the particular intent, so far as it is consistent with the rules of law. The observations which fell from Lord *Kenyon* in *Doe dem. Bean v. Halley* (a), shew that he understood the rule in this sense. That case in some material points resembles the present. There, the devise was to the testator's nephew *A.* and his assigns for life, without impeachment of waste, and after his decease, to the eldest son of his said nephew *A.* lawfully to be begotten, and the heirs of such eldest son, upon condition that such eldest son should be christened by the name of *F.*, and in default of issue male of his said nephew, then over to his nephew *B.* and his eldest son in like manner. The Court of King's Bench held that the evident intention being that *B.* and his issue should not take until the male issue of *A.* should have become extinct, *A.* took an estate tail by implication, and then the limitations were to be read, to *A.* for life, remainder to his eldest son in tail male (and not in fee as had been contended), remainder to *A. himself in tail male*, remainder over. In that case the devise was to a particular class of children, *i. e.* the eldest sons of the first takers, and not to all their sons generally. In the present case, also, the limitation is to a particular class of children, *viz.* to children living at the death of the tenants for life, and not to all the children. In *Parr v. Swindells* (b) a gift of real estate to *A.* for life, with remainder to her children (without any words of limitation) as tenants in common, and in case *A.* should die without leaving lawful issue, then with remainder over, was held to be a gift to *A.* for life, with remainder to

(a) 8 T. R. 9.

(b) 4 Russ: 283.

her children for life, *with remainder to A. in tail*. It has been argued that the will must be construed, in one part, as if the words "*without issue*" were "*leaving issue*;" but the Court will not change the words of the will unless it be clear that the legal intent of the testator will thereby be effected. Now here the testator first gives estates for life, with remainder to children living at the death of their parents, with benefit of survivorship if any of them die without issue. His attention would naturally be next drawn to the supposition that *all* such children might die without issue; and the next sentence in the will is consistent with that supposition. He then certainly introduces a clause which is inconsistent with that idea, viz. a limitation to the issue of such children after the decease of all of them without issue; and it must be further argued that the words "*after the decease of all*" are to be altered into "*after the decease of any*;" so that a double alteration would be in the will, the effect of which would be to let in limitations which are in themselves contrary to law, as too remote. But although a court of justice, in *construing* a will, may, from what is expressed, necessarily *imply* an intent not particularly specified in words; yet it cannot, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omissions. Per Lord Mansfield in *Chapman v. Brown* (a). Here, the best course will be, to allow the will to stand as it is written, and put such construction upon it as the words will admit of. And the result of such a construction will be, that *F. C. Gallini* will take an estate for life; to go over, if he dies

1833.

Dor dem.
GALLINI
against
GALLINI.

(a) 3 Burr. 1634.

1833.

DOX dem.
GALLINI
against
GALLINI.

without issue, which, in other words, is an estate tail. In reference to the gift over on a general failure of the issue of the testator's sons and daughters, it may be observed that in the case of *Bennett v. Lowe* (a), where there was a devise to D., L., V., and S. (females), and in case any of them died leaving a daughter or daughters, her share to go to such daughters in seniority, but if any of them, D., L., V., and S., should die *without issue* in the lifetime of M., C., A., and W., the share of her and them so dying to go to F. and others in succession, all the rest and residue of the devisors' estates to go to D.: it was held that D., L., V., and S., and their daughters, took estates for life only, notwithstanding the limitation over on a general failure of issue, and that D. had a remainder in fee in the whole. Therefore, it is not so clear, that under the general limitation over, in default of issue of any of the testator's children, as contained in this will, an estate tail must be implied, as contended on the other side, inasmuch as the word *such* might if necessary be implied. But the construction of the children of the testator taking an estate tail (even if admitted) would not be inconsistent with a prior gift to their own children as purchasers for life or in tail. In *Mortimer v. West* (b) the authorities do not appear to have been considered, and the issue dying in the lifetime of the first takers were not excepted as in the present case. If the will is permitted to remain as it is framed, *Alfred Gallini* takes an estate tail as proposed; if it be altered, there will still be enough to give him an estate for life; and in either view of the case the plaintiff must be nonsuited.

(a) 7 Bing. 535.

(b) 2 Simons, 274.

Lynch in reply. *Parr v. Swindells* (a) is distinguishable, because there was no devise to the issue of the grandchildren, who took life estates only as tenants in common; and, if not, it is at variance with *Jesson v. Wright*, which was not cited. In *Doe v. Halley* (b), an estate of inheritance was given to the nephew's eldest son: here, no estate of inheritance is given to the testator's sons and daughters, and their children. Besides, in *Doe v. Halley*, the testator gave the estate on condition that his name should be taken by the eldest son, thereby shewing the intention to found a family. Stress has been laid upon the fact, that in this case the limitation, after the sons and daughters, is only to a particular class of children, viz. those living at the deaths of the sons and daughters; but *Langley v. Baldwin* (c) furnishes an answer to that observation. The intent here was to confer an estate on all the issue of the sons and daughters. When the testator refers to the survivorship among the sons and daughters, he refers to the failure of issue, not *such* issue, and the gift over is on failure of issue generally; and it was so in *Mortimer v. West* (d).

1833.

DOE dem.
GALLINI
against
GALLINI.

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court, first stating the will and the facts of the case.

In this ejectment the lessor of the plaintiff cannot succeed, unless he establishes that *Francis*, the eldest son, took an estate tail in the whole of the *Berkshire* property; in which case, that estate tail would have descended on the lessor of the plaintiff, as eldest son

(a) 4 Russ. 283.

(b) 8 T. R. 5.

(c) 1 P. Wms. 59. note. 1 Equity C. Abr. 185.

(d) 2 Simons, 274.

1833.

—
 DOX dem.
 GALLINI
 against
 GALLINI.

and heir of the body of *Francis*. If the defendant, and the other brothers and sister of the lessor of the plaintiff, took estates for life, or estates tail in undivided shares, as tenants in common, the defendant is entitled to our judgment; and we are of opinion that he is, either on one of these grounds or the other.

For the plaintiff it was contended, that in order to effectuate the general intent of the testator, the particular intent must be sacrificed: and that here, the general intent was, that all the heirs of the body of the devisee *Francis* should take before his sisters and brother; and, therefore, that he took an estate tail under the will.

The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late; as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results (*a*). In its origin, it was merely descriptive of the operation of the rule in *Shelley's* case; and it has since been laid down in others, where technical words of limitation have been used, and other words, shewing the intention of the testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord *Redesdale* in *Jesson v. Wright* (*b*). This doctrine

(*a*) See *Powell on Devises*, 3d ed. c. 27. vol. 2. p. 552.

(*b*) 2 *Bligh*, 57.

of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is, that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject.

We have now to apply these rules to the instrument in question, which is a very inaccurately penned will, and to some part of which it is impossible to give any meaning at all in the ordinary mode of reading it.

It is perfectly clear, that the testator meant to give a remainder, after the death of his eldest son *Francis*, to his (*Francis's*) *child or children living at the time of his decease*, or born in due time afterwards, as purchasers, as tenants in common, and not as joint tenants; and if the limitation to the children had stopped there, there is no doubt it would have given them estates for life. The will then proceeds to give an equal benefit of survivorship among the rest of the said children, if more than one, and any of them shall die *without leaving issue*: if it stood there, as the testator did not mean another child to take until failure of the issue of the first, each child would have an estate tail in his undivided share. Then follows a clause which is unintelligible, and the language of which must be varied, in order to give it some meaning. On the part of the plaintiff, it is proposed to read, instead of the words "*without issue*," the words "*leaving issue*."

Assuming that alteration to be right, the argument founded upon the whole will is, that the testator means the estate left to each of his sons and daughters to go to the whole line of issue of those sons and daughters respectively;

1833.

Dor dem.
GALLINI
against
GALLINI.

1833.

DOR dem.
GALLINI
against
GALLINI

respectively; and only on failure of the whole line of issue to go over: and this on account of the use of the term *issue* of the sons and daughters, which word issue is here to be considered, (as it generally is), a word of limitation, and equivalent to the term "heirs of the body," and embracing the whole line of lineal descendants; and, therefore, it is contended, that each son and daughter took an estate tail in the portion left to him. But if the term "issue" is here a word of limitation, why is it not equally so in the part in which the estate is given over to the surviving children of the sons and daughters, if any of them shall die without leaving issue? From which it is clear that the testator does not mean the survivors to take, till failure of all the issue of the deceased children. If the term "*issue*" has here the same meaning, then the children living at the time of the death of the sons and daughters respectively must take estates tail, as tenants in common, in their respective shares, with cross remainders either for life or in tail (which, it is unnecessary to decide,) and that question will depend upon the construction of the very ambiguous passage already referred to; with remainder to the sons and daughters in tail, in their respective shares, and remainders over: and this construction makes the least sacrifice of the testator's declared intention; it preserves estates to *all* his grandchildren living at the death of his sons and daughters, as tenants in common, which it is clear the testator intended to give: and it also includes the descendants of a grandchild dying in the son's or daughter's lifetime, though the estate to them is postponed to that to the children; and it includes all the issue of each son and daughter before the estate goes over. The estate tail in the sons and daughters takes effect, not in derogation of, but by way
of

of remainder on, the express estates given to the children of the sons and daughters; in which respect it resembles the case of *Doe dem. Bean v. Halley (a)*. It is true that these grandchildren cannot take estates for life, as the testator intended, for the rule in *Shelley's* case prevents it; nor the children of those children estates for life as tenants in common, for the rule of law against perpetuities prevents that; but this is unavoidable, and no construction can carry into effect all the testator wished.

It is, however, said, that the term "*issue*," as applied to the children, is not to be read as a word of limitation, including all the descendants, but is explained by the context to mean the children of the children to whom estates for life are before given; but if the word *issue* means children in one part, what reason is there why it should not have the same meaning in another? for it is perfectly clear that the testator intends the estate to go to the issue of the sons and daughters, in the same *manner* as to the issue of the children; and the same description of persons must take under that denomination in both cases. Hence if the word *issue* is to be construed as "*children*," it is to be so construed in both cases: and then the eldest son, the father of the plaintiff, certainly did not take an estate tail, and the plaintiff cannot succeed.

The case, therefore, is reduced to this point: the plaintiff must fail unless he took an estate tail; and he could not take an estate tail unless in remainder, the defendant and his brothers and sisters having previous estates tail in the property in question.

The cases upon which the plaintiff principally relies,

(a) 8 T. R. 5.

1833.

—
Doe dem.
GALLINI
against
GALLINI.

are

1893.

Dox dem.
GALLINI
against
GALLINI.

are that of *Murthwaite v. Jenkinson* (a), which is contended not to be distinguishable from the present, and *Wollen v. Andrews* (b). In the first-mentioned case the devise was to the nieces, and, after their decease, to the *lawful issue* of them for life; and, if either of the nieces should die in the lifetime of the others without issue of her body, the share of the niece dying without issue should go to the survivors and the lawful issue of the survivors. This case is an example of the proper construction of the word "*issue*," which was considered as a word of limitation, embracing all the descendants, and in which the inconsistent intent, that all those descendants should take for life, formed no reason why they should not take at all, and why the word should not be construed in its proper and legal sense. Here the term *issue* is not used in the devise in remainder after the death of the son and daughters; but the estate is expressly devised *to the children living* at the death of the sons and daughters, which circumstance completely distinguishes that case from the present.

In the other case relied on, *Wollen v. Andrews* (b), the devise was to the children of the testator, of one sixth part each for life; after their deaths, to all and singular their child and children in equal parts, and so on from *children to children*; and if any of his children should die without leaving issue, then to the survivor. It was held that the children of the testator took an estate tail. This differs from the present case in two respects: Here, the devise is not to all the grandchildren, but there is a *selection* of lives with trustees to support. There, there was no alternative, but to hold that there

(a) 2 B. & C. 357.

(b) 2 Bing. 126.

was to be a series of estates for life, or an estate tail in the children. Here, there is, by giving an estate tail to the grandchildren.

Thinking, therefore, that this mode of construing the will gives effect to the greater part of it, and as far as the rules of law will permit, the whole, whilst that contended for on the part of the plaintiff strikes out altogether the devise to the grandchildren, our opinion is, that the former ought to be preferred, and that our judgment must be for the defendant.

Judgment for the defendant.

1833.

DON dem.
GALLINI
against
GALLINI.

ELIZA KELLY *against* PARTINGTON.

Thursday,
Nov. 14th.

SLANDER. The declaration began with the usual averment of the plaintiff's good conduct and character, and stated that the defendant, contriving and intending to injure the plaintiff in her good name, &c. as a shopwoman and servant, falsely and maliciously spoke certain words mentioned in the first count. The second count stated that the defendant, further contriving and intending as aforesaid, falsely and maliciously spoke and published of and concerning her, as such shopwoman and servant, these other false, scandalous, malicious, and defamatory words following: that is to say, "she (meaning the plaintiff) secreted 1s. 6d. under the till;

Declaration in slander. The second count stated that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her, as such, the following words:—"She (meaning the plaintiff) secreted 1s. 6d. under the till; stating, these are not times to be robbed." The declaration alleged

as special damage, that one S. by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held, that the words in the second count, if actionable at all, were so only by reason of the special damage, and, therefore, that the plaintiff, if entitled to recover, ought to have full costs:

Held, secondly, on motion in arrest of judgment, that the words in that count were not defamatory in their nature, and therefore were not actionable, even though followed by special damage.

stating,

1833.

KELLY
 against
PARTINGTON.

stating, these are not times to be robbed (a).” The declaration concluded with an allegation of special damage, that one *Stenning*, by reason of the speaking of the words, refused to take the plaintiff into his service (b). The jury found a general verdict for the plaintiff with 1s. damages, and the Master having declined to allow the plaintiff more costs than damages, a rule nisi had been obtained for taxing the plaintiff her increased costs in the cause, against which

Sir *James Scarlett* and *Kelly* now shewed cause. The statute 21 Jac. 1. c. 16. s. 6. which enacts, that in actions for slander where the jury assess the damages under 40s., the plaintiff shall recover no more costs than damages, does not extend to cases where the special damage is the gist of the action: *Savile v. Jardine* (c). But here all the counts contain words actionable in themselves. [*Campbell* (Solicitor-General) intimated that he should rely on the second count.] The words in that count necessarily import a charge of felony, and even if they were ambiguous, they must be taken, after verdict, to have been used in that sense.*

Sir *J. Campbell* (Solicitor-General) contra. The 21 Jac. 1. c. 16. takes away costs in actions for words, if the damages be under 40s.; but *Savile v. Jardine* (c) shews that if there be any one count for words not actionable in themselves, and special damage is laid re-

(a) It appears that the latter words, “stating,” &c. were in fact part of the expressions supposed to have been used by the defendant himself, but had by mistake been inserted in this count, as if alleged by him to have been spoken by the plaintiff.

(b) See *Kelly v. Partington*, 4 B. & Ad. 700.

(c) 2 H. Bl. 531.

ferring

ferring to all the counts, and the plaintiff has a verdict on the whole declaration, though the damages be less than 40s., he is entitled to full costs. The words in the second count would not be actionable but for the special damage: they do not, of themselves, impute a charge of felony; they rather import that the plaintiff exercised great caution in taking care of her own property. [*Parke J.* If the words are to be taken in that sense, can it be said that the damage resulted from them, and ought not the judgment to be arrested?]

1833.

KELLY
against
PARTINGTON.

DENMAN C. J. The question is, whether there be any count in the declaration, which contains words not actionable in themselves. It seems to me that the second count does contain such words, for they may undoubtedly be considered as having been spoken in the sense ascribed to them by the Solicitor-General.

PARKE J. It is impossible to understand the words in any other than their grammatical sense; and so construing the words in the second count, they are not actionable in themselves; for they do not, necessarily, charge the plaintiff with a crime. What the effect of that may be ultimately, it is unnecessary to say.

TAUNTON and PATTESON Js. concurred.

Rule discharged.

Sir *James Scarlett* then obtained a rule nisi for arresting the judgment, on the ground that the words in the second count, taken in their grammatical sense, were not disparaging to the plaintiff; and, therefore, that no special damage could result from them.

The

1833.

KELLY
against
PARTINGTON.

The *Solicitor-General* in *Hilary* term following shewed cause. The words in the second count (as the Court has already decided) are not actionable without special damage. The question is, whether they are actionable even with special damage. [*Denman* C. J. It is contended that the words import that the plaintiff secreted her own money from excessive caution.] The words may not be actionable of themselves, but such words, if a jury find them to have been spoken with a malicious intent to injure the plaintiff, as charged in this declaration, are actionable by reason of special damage. *Comyns* C. B. in his *Digest*, tit. *Action on the Case for Defamation*, D. 30. after having stated, under the previous heads, many instances of words actionable in themselves, says, that an action may be maintained for “any words by which the party has a special damage.” Even, therefore, if the words in question bore the sense ascribed to them, yet being spoken falsely and maliciously with intent to injure, and followed by special damage, they are actionable. And these were in fact not innocent, but disparaging words, or at all events equivocal; and it was for a jury to find in what sense they were used. The word *secreted* is used in a bad sense, it usually imputes some bad motive. If the words, “stating, these are not times to be robbed,” apply to the plaintiff, they are ambiguous; they may have been used by her as a pretence for secreting money belonging to another, and that question was for the jury. [*Littledale* J. Suppose a man had a relation of a penurious disposition, and a third person knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?] If the words were spoken falsely

falsely with intent to injure, they would be actionable. At all events, if the words are not laudatory, but will bear a bad sense, and a jury might find (as they did here) that they were used in that sense, and an injury is stated to have ensued in consequence, they are actionable.

1833.

KELLY
against
PANTINGTON.

Sir *James Scarlett* *contra*. It does not appear by the words themselves, or by any innuendo, whose property the 1s. 6d. was. It may have been that of the plaintiff, and if so, it is clear that the words do not import a charge of felony. They cannot amount to such a charge unless it be assumed that the property meant was that of the defendant or some third person. It is not true that an action may be maintained for words of praise (not used ironically) if followed by special damage. No case can be cited to that effect. An action is only maintainable for special damage when it is the natural result of a wrongful act. The uttering of words not defamatory of another is not wrongful; and, therefore, even when followed by special damage, gives no ground of action. The words being innocent in themselves, there is no ground for presuming malice, and a jury cannot infer it.

DENMAN C J. The declaration alleges that the defendant, intending to injure the plaintiff, maliciously spoke these words: "She (the plaintiff), secreted 1s. 6d. under the till; stating, that these are not times to be robbed," by reason whereof a damage ensued to the plaintiff. The words do not of necessity import any thing injurious to the plaintiff's character, and we think that the judgment must be arrested unless there be something on the face of the declaration from which

VOL. V.

U u

the

1833.

KELLY
against
PARTINGTON.

the Court can clearly see that the slanderous matter alleged is injurious to the plaintiff. Where the words are ambiguous, the meaning may be supplied by innuendo; but that is not the case here. The rule for arresting the judgment must therefore be made absolute.

LITLEDALE J. I cannot agree that words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In *Comyns's Dig.*, tit. *Action on the Case for Defamation* (D) 30., it is said *generally*, that any words are actionable by which the party has a special damage, but all the examples given in illustration of that rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporal punishment. In all the instances put, the words are injurious to the reputation of the person of whom they are spoken. The words here are extraordinary; if they had stood merely, "she secreted 1s. 6d. under the till," they might perhaps have been actionable, but coupled with the subsequent words, which appear only to import great caution on the part of the plaintiff, I think we cannot say that they impute any thing injurious to the plaintiff.

TAUNTON J. I am of the same opinion. The expression ascribed to the plaintiff, "these are not times to be robbed," seems like saying that times are so bad I must hide my money. If *Stenning* refused to take the plaintiff into his service on this account, he acted without reasonable cause; and in order to make words actionable, they must be such that special damage may be the fair and natural result of them.

PATTESON

PATTESON J. I have always understood that the special damage must be the natural result of the thing done. The words here are "The plaintiff secreted 1s. 6d. under the till; stating, these are not times to be robbed." There is no innuendo stating whose money it was that she secreted; it might be her own. Then it is said that the words are actionable, because a person after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory (a).

1853.

KELLY
against
PARTINGTON.

Rule absolute.

(a) See *Vicars v. Wilcocks*, 8 East, 1.

RICKMAN and Another *against* CARSTAIRS.

ASSUMPSIT on a policy of insurance on the ship *Mary* and cargo. The declaration set out the policy hereafter described, and alleged that the defendant had assured to the amount of 200*l.*; that goods to the value of 4800*l.* were shipped; that goods to the value

Valued policy of insurance on ship and goods, at and from the coast of *Africa* to the ship's port of discharge in the United Kingdom, with

liberty to touch at all ports and places whatsoever and wheresoever; to trade backwards and forwards in any order, and to call at or proceed to the *Azores*, *Madeira*, &c. and all *African* islands; beginning the adventure on the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of *Africa*, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter, or exchange with any ships or factories wheresoever she might call.

1. The policy does not protect an outward cargo shipped before the vessel's arrival on the coast of *Africa*.

2. A considerable proportion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy: Held, that the valuation was opened, and that, although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assured could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss.

1833.

RICKMAN
against
CARSTAIRS.

of 1000*l.* were lost in a boat by perils of the sea; and that the best bower anchor, of the value of 50*l.*, was lost by perils of the sea; that other goods, to the value of 3000*l.*, being a part of the said cargo in the said policy mentioned, were taken by thieves; and that afterwards the ship, with goods to the value of 10,000*l.*, being the cargo in the said policy of assurance mentioned, was lost by perils of the seas. At the trial before *Denman C. J.*, at the *Guildhall* sittings, *December* 1832, the policy was proved, and purported to be "at and from [the coast of *Africa* to her port or ports of discharge in the United Kingdom of *Great Britain*, with liberty to touch at all ports and places whatsoever and wheresoever, to trade forwards and backwards and backwards and forwards, and in any order, and with leave to call at or proceed to the *Azores*, *Madeira*, *Canaries*, *Cape de Verdes*, *St. Thomas's*, *Princes*, and *Anabona*, *Ascension*, and all *African* islands, and all rivers wheresoever, for any purposes.] Upon any kind of goods and merchandizes, and also upon the body, tackle, &c. of the ship [*Mary*]: beginning the adventure upon the said goods and merchandizes, from the loading thereof aboard the said ship [twenty-four hours after her arrival on the coast of *Africa*] upon the said ship, &c. [including the risk in boats and craft in loading and unloading], and so shall continue, &c., until the said ship, with all her ordnance, &c., and goods and merchandizes whatsoever, shall be arrived at [her port of discharge in the United Kingdom], upon the said ship, &c., until she hath moored, &c., and upon the goods and merchandizes, until the same be there discharged, &c.; and it shall be lawful for the said ship, &c. in this voyage to proceed and sail to, and touch and stav at, any ports or places whatsoever

[and

[and wheresoever, with liberty to dock or heave down, to load, unload, sell, barter, and exchange, all or either, goods and property, with any ships, boats, craft and factories, wheresoever she may call at or proceed to, also with liberty to take on board and load passengers, without being deemed deviation and] without prejudice, &c." The ship was valued in the policy at 1200*l.*, and the cargo at 4800*l.*, average to be paid on each species of goods as if separately named. The words above included in brackets were inserted in the printed policy in writing. The loss occurred on the coast of *Africa* many months after the arrival of the *Mary* on the coast; and at the time of the loss, she had on board a part of the outward cargo, shipped in *England*, which the plaintiff's witnesses valued at 800*l.*, and a homeward cargo taken on board, valued by the plaintiff's witnesses at 4150*l.* This last value was estimated upon the prices of the goods in *London*. Other goods, bespoken for the homeward cargo, had not been shipped, the value of which, estimated in the same way, was about 600*l.*; and evidence was also given that some goods, which had actually been shipped on board for a homeward cargo, had been taken on shore by the captain, and had been there stolen. The defendant's counsel admitted the total loss of the ship and cargo on board (a), and the underwriter's liability to the extent of the valuation of the ship. But he contended that the policy on the goods did not cover the outward cargo, and that therefore no part of that cargo could be taken into account in estimating the value of the goods lost; and, further,

(a) Some property was in fact shewn to have been saved: but the defendant's counsel, in moving for the rule, admitted, for the purpose of the present case, a total loss.

1833.

 RICKMAN
against
 CARSTAIRS.

1888.

RICKMAN
against
CARSTAIRS.

that the value put on the goods in the policy related only to the homeward cargo intended to be shipped after the ship's arrival on the coast of *Africa*, and that therefore the policy would be opened, on account of the proposed homeward cargo having, as to a part, never been shipped, and, as to another part, been unshipped at the time of the loss. Fraud was not imputed. The Lord Chief Justice was of opinion, that the policy was not opened; but he desired the jury to say, on the supposition of its being opened, whether there were goods on board to the value of 4800*l.* at the time of the loss; telling them that, on the above supposition, the outward cargo must be included. The jury found expressly that the cargo on board was of the value of 4800*l.*; and gave a verdict for the whole 200*l.* Sir *John Campbell*, Solicitor-General, obtained a rule nisi for a new trial, in *Hilary* term 1883; against which, in *Trinity* term 1889,

Sir *James Scarlett*, *F. Pollock*, and *Blackburne* shewed cause (a). First, the outward cargo was protected by the policy. It will be contended on the other side that the words "beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of *Africa*" limit the protection to such goods as were not put on board till after her arrival on the coast of *Africa*; and *Robertson v. French* will be cited (b). The words of the policy, in that case, were "beginning the adventure upon the goods and merchandizes from the loading thereof aboard the said ship at all, any, or

(a) Before *Denman C. J.*, *Littledale*, *Parke*, and *Patterson J.*

(b) 4 *East*, 130. (2d point.)

every port and place where and whatsoever on the coast of *Brazil*, and from the 17th day of *September* 1800;" and the Court held that there was no intention to insure an outward adventure which was not wound up at the time of the loss; and that the indemnity extended to such goods only as were shipped on the coast of *Brazil*. There the loading was expressly limited to the place; and that decision cannot be questioned. Then came the case of *Spitta v. Woodman* (a). There the words are "beginning the adventure upon the said goods from the loading thereof on board the said ship," not saying where; but, in the earlier part of the policy, the ship was insured "at and from *Gottenburgh* to," &c. The Court held that goods were not protected which were shipped before the vessel arrived at *Gottenburgh*; and Sir *J. Mansfield's* reason appears (b) to have been, that, by a contrary construction, the underwriter might become liable to an average loss occurring before the ship reached *Gottenburgh*. That reasoning has been shaken by more recent dicta. In *Gladstone v. Clay* (c), *Bayley J.* answered Sir *J. Mansfield's* argument (that the underwriters might be liable for damage antecedent to the voyage insured) by saying, that the assured would be bound to prove that the damage occurred during the voyage covered by the policy, and could not otherwise recover. In *Hunter v. Leathley* (d), the policy was at and from *Singapore, Penang, Malacca, and Batavia*, all or any, to the ship's port of discharge in *Europe*, with leave to touch and stay, and trade at all or any port or

1833.

 RICKMAN
 against
 CARSTAIRS.

(a) 2 Taunt. 416.

(b) 2 Taunt. 423, 424. and see note (a) on *Nonnen v. Kettlewell*, 16 East, 188.

(c) 1 M. & S. 425.

(d) 10 B. & C. 858.

1839.
 RICKMAN
 against
 CAUSTAIN.

places, whatsoever and wheresoever, in the *East Indies*, *Persia*, or elsewhere, &c., upon goods in certain vessels, beginning the adventure from "the loading thereof aboard the said ships *as above*." The question was, whether goods taken on board after the ship left *Batavia*, at *Sourabaya*, a port in the *East Indies* not expressly named in the policy, to which the ship went in the prosecution of the adventure, were protected. The Court held that they were. In *Bell v. Hobson* (a) the policy, (which was "at and from *Gottenburgh*,") differed from that in *Spitta v. Woodman* (b), in the circumstance that the ship was at liberty "to take in and discharge goods wheresoever the ship might touch at," and that, at the foot, there was added, "in continuation of five policies," which were described by dates and amounts; and these policies had the words "at and from *Virginia* to her port or ports of discharge in the United Kingdom, or any port or ports, place or places, in the *Baltic*;" and the percentage was to vary according as the voyage ended at *Gottenburgh* or elsewhere. The Court there held, that goods shipped at *Virginia*, before the arrival of the ship at *Gottenburgh*, were protected by the policy upon which the action was brought, although the defendant had not underwritten the five other policies (c); and Lord *Ellenborough* said that the construction adopted in *Spitta v. Woodman* (b) was not to be favoured, and still less to be extended; and that any thing indicating that a prior loading was contemplated by the parties would release the case from that strict construction. In *Gladstone v. Clay* (d), the

(a) 16 *East*, 240.

(b) 2 *Taunt.* 416.

(c) 16 *East*, 243.

(d) 1 *M. & S.* 418.

1833.

RICKMAN
against
CARSTAIRS.

policy was at and from *Pernambuco* to *Maranham*, and at and from thence to *Liverpool*, beginning the adventure upon the said goods from the loading thereof on board the said ship, *wheresoever, &c.*; and it was held, that goods shipped before the ship arrived at *Pernambuco*, and lost after such arrival, were protected. The words here are, beginning the adventure upon the goods from the loading thereof aboard the said ship, "twenty-four hours after her arrival on the coast of *Africa*:" the latter words being in writing. It is not as if the insurance had been "from the loading of the goods on the coast of *Africa*:" and the liberty of touching at all ports, and trading backwards and forwards, given by the written words of the earlier part of the policy, shew that the parties looked to a trading voyage, and to a risk continued from preceding policies on the same subject matter, as in *Bell v. Hobson (a)*; for a policy on goods outwards usually limits the risk to twenty-four hours after the ship's arrival. It could not be supposed that the outward cargo was to be unshipped within twenty-four hours of the arrival. If the words "loading thereof" are to be strictly connected with the words "twenty-four hours after her arrival on the coast of *Africa*," goods shipped within less than twenty-four hours after the ship's arrival, and lost thirty-six hours after, would not be protected, since there is as much ground for applying the time to the loading as the place. The twenty-four hours are named for the purpose of defining the time at which the risk commences, and do not refer at all to the printed

(a) 16 East, 240.

1893.

RICKMAN
against
CARSTAIRS.

words "from the loading thereof:" indeed, the policy might be construed as if these printed words were struck out. If they be inconsistent with the written words, the latter must control the contract. Brokers never strike out words from the printed forms, but only add. [*Paterson J.* You do not say the goods would be protected in case of a loss within twenty-four hours.] That would be out of the protection for a different reason; the risk on the policy would not have commenced at all, in consequence of the limitation as to time, whatever goods the policy related to. Then, as to the written words, "including the risk in boats and craft in loading and unloading," if these be applicable to the unloading of the outward cargo, they are sufficient, being written, to control the unwritten part of the policy; and it cannot be said that the unloading is confined to goods laden on the coast of *Africa* only, for the *arrival* is all that can be read as connected with *Africa*. [*Parke J.* In *Park v. Hammond (a)*, where goods were shipped from *Malaga*, and the owner desired his broker to insure them from *Gibraltar* to *Dublin*, saying that he would take on himself the risk from *Malaga* to *Gibraltar*, the Court of Common Pleas held it to be clear that a policy on the goods, "at and from *Gibraltar* to *Dublin*," not stating them to have been laden at *Malaga*, did not protect them, and was not in compliance with the order.]

Secondly, the policy is not to be opened on the ground of a part of the cargo not being on board at the time of the loss. There is no pretence of fraud

(a) 2 Marsh. 189. S. C. 6 Taunt. 495.

here;

here; the jury have found that, if the policy be open, there was enough on board to cover the value insured. Lord *Kenyon*, in *Shawe v. Felton* (a), expressed himself strongly against opening valued policies; and the Court, in that case, would not allow the consumption of the ship's stores, which had taken place during the voyage, to be deducted from the value, no fraud being shewn. The true effect of such policies is explained in the judgment of Lord *Mansfield* in *Lewis v. Rucker* (b), from which it appears that the value fixed is conclusive, unless fraud be shewn. In *Forbes v. Aspinall* (c), a ship had gone out on a seeking voyage, and had not obtained a cargo; and it was held that the valued policy on the freight did not attach. That is not like the present case; and in *Montgomery v. Eggington* (d) a valued policy was supported, where a cargo had actually been obtained, of which, however, a part only was on board, the jury having found that the insurance was not colourable, and the policy not a wager. If the policy can be opened, though in the absence of fraud, by reason of a part of the intended cargo not being shipped, the omission of the most trifling part would open the policy. Indeed, if *Forbes v. Aspinall* (c) be applicable, the consequence would be, that on an insurance of freight valued at 5000*l.*, the freight on the intended cargo being 5100*l.*, the policy would be opened if the cargo corresponding to the 5000*l.* only were shipped.

Sir *J. Campbell*, Solicitor-General, and *Maule*, *contra*, were desired by the Court to confine themselves to the

1833.

RECKMAN
against
CAPTAIN.

(a) 2 *East*. 114.; and see *Le Cras v. Hughes*, cited, *Ibid*. 113.

(b) 2 *Burr*. 1171.

(c) 13 *East*, 323.

(d) 3 *T. R.* 362.

1823.

BLOKMAN
against
CAPTAINS.

second question. The underwriter is bound by the valuation on the freight and goods, only where all the cargo, which was the subject of the contract, is on board. On any other construction, the effect of the policy would often be, not to indemnify, but to confer a positive profit. Suppose there were only 100*l.* worth on board of a cargo valued at 3000*l.*, could the underwriters be called on to pay the 2900*l.*? It is true that, in the case of stores, the underwriters are not allowed to deduct for the consumption *de die in diem*, and this is all that *Shaw v. Felton (a)* establishes. There the whole subject-matter was on board at the commencement of the risk. The present insurance is on goods; and the cargo to which the contracting parties looked never was on board. There is no distinction between insurance on freight and on goods; and, therefore, *Forbes v. Aspinall (b)*, which was on freight, is in point. In that case, both *Shaw v. Felton (a)* and *Montgomery v. Eggington (c)* were considered; and in *Marshall on Insurance*, b. i. ch. 7. § 5., it is stated as the result of later cases, "that the insured can only recover, whether on an open or a valued policy, for the freight of goods actually put on board, or of which the shipment has been contracted for;" and *Forbes v. Cowie (d)*, and *Forbes v. Aspinall (b)*, are referred to. [Parke J. Then comes the difficulty, what is a cargo sufficient to entitle the jury to say that that has been shipped, to which the valuation in the policy refers? that was not considered in *Forbes v. Aspinall (b)*.] The jury might consider what was a reasonable quantity to be carried as a cargo. [Parke J. Supposing the policy

(a) 2 *East*, 109.(b) 13 *East*, 323.(c) 3 *T. R.* 362.(d) 1 *Camp.* 520.

to be opened, two terms are unknown of the proportion by which the average is to be estimated.] The cargo contemplated may be estimated by the outward cargo; for, in an *African* voyage, we may presume that the whole outward cargo was intended to be bartered, or evidence might be given as to the intention of the assured, or the capacity of the ship, so as to shew what is the full cargo on which the proportion is to be estimated. [*Patteson J.* By treating this as an open policy, you raise a difficulty as to the first point; for much of the outward cargo will be unprotected, if the valuation in the new policy do not attach till the ship be finally laden with her homeward cargo. Then may not the circumstance, that there is a valuation on the face of the policy, be a ground for inferring that this was inserted to protect the outward cargo? For all the difficulty would vanish, if the parties meant to apply the valuation to whatever might remain, at any time during the trading voyage, of the old, and whatever might be then shipped of the new.] That difficulty might arise, if it were assumed that the outward cargo is to be unshipped by a bargeful at a time, and exchanged piecemeal for a homeward cargo: but the ship may exchange the whole outward cargo, for a complete homeward cargo at once. Besides, there is no ground for assuming the existence of an outward insurance terminating in twenty-four hours. The outward insurance, if there were one, might be on the usual terms, to determine on the safe landing of the goods: and, if so, there would be a double insurance, supposing the new insurance to protect the outward cargo. It cannot be contended that, whenever the loss happens, the cargo on board is protected:

1833.

ROCKMAN
INGHAM
CARSTAIRS.

1883.

—
 RICKMAN
 against
 CARSTAIRS.

tected : for suppose all the outward cargo to have been discharged, and none of the homeward shipped ; in such a case, the valuation could not be supported. But, then, if the valuation be not conclusive in all cases, it follows that it will be opened by the subtraction of a part of the homeward cargo. [*Patteson J.* If there were no goods on board, there could be no loss of goods.] Then suppose only one bale on board. Even supposing the policy to be opened, the valuation will not be altogether inoperative ; for it will prevent any dispute as to the value of the whole contemplated cargo. Thus, if a valued policy on sugar be opened, on the ground of only four fifths of the intended cargo having been shipped and lost the underwriter will pay, not a value to be now put on the lost sugar, but four fifths of the sum underwritten.

Cur. adv. vult.

DENMAN C. J., in this term, delivered the judgment of the Court.

After stating the facts, his Lordship said :— In this case it is with regret that we find ourselves obliged to come to the conclusion that the plaintiffs are not entitled to recover for a total loss ; because it appears very likely that the assured *intended* by this policy to insure both the outward and homeward cargo, and to have valued both ; inasmuch as a great part of the outward cargo would, in such a voyage, remain on board, and would be continually varying in the course of barter, and nothing is more probable than that the entire cargo should be valued, to prevent difficulty of valuation in the case of loss. Unfortunately, however, they have used words which will not, we think, effectuate

effectuate that intention. The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used.

1833.

RICKMAN
against
CARSTAIRS.

The cases of *Robertson v. French* (a), *Spitta v. Woodman* (b), *Horneyer v. Lushington* (c), *Langhorn v. Hardy* (d), and others, have established that where the policy is upon goods, "from the loading thereof," either at a particular place, or in blank upon a voyage from one place to another, it does not attach upon goods previously on board; but this, being a strict construction, has been relaxed where there was any thing upon the face of the instrument to satisfy the Court that the policy was intended to cover goods previously on board. Thus in *Bell v. Hobson* (e), where the policy was declared to be "in continuation of others," which were upon a voyage to the port from which the risk insured began, and in *Gladstone v. Clay* (g), where the words used were "wheresoever, &c.," it was held that the assurance was not confined to goods put on board in the course of the voyage insured.

The question then is, whether there is any thing disclosed upon the face of this policy by which the Court can be convinced that it was intended to attach upon the outward cargo, the nature of the voyage, of which the underwriter must be presumed to be cognizant, being also taken into consideration.

The only circumstance which can have this effect, is the memorandum, which declares the insurance to be

(a) 4 East, 130.

(b) 2 Taunt. 416.

(c) 15 East, 46.

(d) 4 Taunt. 630.

(e) 16 East, 240.

(g) 1 M. & S. 418.

" on

1893.

RICKMAN
against
CARSTAIRS.

"on the cargo valued at 4800*l.*," and it occurred at one time to a part of the Court, that this raised a presumption that the parties contemplated such a cargo to be the subject of the assurance as was capable of being valued at the full amount insured, when the policy attached, *i. e.* when the ship had arrived twenty-four hours on the coast of *Africa*, and that the entire cargo, consisting of outward and homeward goods, would alone answer that description. If this were clearly the meaning of this clause, we agree that we might reject or qualify the words, "from the loading thereof aboard the said ship," as we certainly might have done if it had been said expressly in the memorandum, that the insurance was on the cargo *both* outward and *homeward*, valued at 4800*l.* But the difficulty is to make out that this is clearly the meaning of the memorandum in question.

Suppose the words of the memorandum had been, "on the *homeward* cargo," valued at the same sum, would there have been any inconsistency in making such a valuation, and would the fact therefore of making such a valuation enable the Court to say, that the word *homeward* must be rejected, and the insurance applied to the whole of the goods on board? Or suppose that in the earlier part of the policy, the insurance had been "upon any kind of goods and merchandises, laden on board, after twenty-four hours after arrival on the coast of *Africa*," would the valuation by the memorandum in any way have qualified or varied the subject of assurance? If it would not, neither can it in the present case; for the declaration in the policy, that the adventure is to begin from the loading thereof
aboard

aboard twenty-four hours after such arrival, is in effect the same thing, and confines the insurance to the homeward cargo.

It is very true that there will be some difficulty in making the proper calculation as to the sum to be paid, on the supposition that the subject of insurance is the full homeward cargo; because, on such a voyage, it is not easy to say what the value of a full home cargo will be; nor what proportion of a full cargo is on board at the time of the loss. That difficulty occurred, and nearly to the same extent, in *Forbes v. Aspinall* (a), though it does not seem to have been brought to the attention of the Court; but it cannot enable us to reject the words which cause the policy to attach on the homeward cargo only, and to declare that the policy was meant to include both.

We think, therefore, that there should be a new trial; but it will be much better to refer the average loss, as the plaintiffs are clearly entitled to recover it.

Rule absolute.

(a) 13 East, 323.

1833.

RICKMAN
against
CARSTAIRS.

1833.

Thursday,
Nov. 14th.

The KING against HEMING.

A party who applies to the Court for a criminal information against a defendant for breach of duty as a magistrate as well as an individual, must, before motion, give notice to the defendant of his intended application.

A RULE nisi had been obtained for a criminal information against the defendant, on affidavits stating, that at an election for members of parliament for the northern division of the county of *Warwick*, at *Nuneaton*, one of the polling places of that division, a riot had taken place, and that the defendant, a magistrate of the county, had neglected his duty, by refusing to call in the military, or to establish a sufficient force to repress the riot, and also that he, defendant, had taken an active part in the riotous proceedings.

Sir *J. Campbell* (Solicitor-General) now objected that notice of the application to the Court had not been given to the defendant, before the criminal information was moved for.

Sir *James Scarlett* contra, contended that the defendant was charged with an offence, including a breach of his duty as an individual as well as a magistrate, and therefore that the want of notice was no answer to the application.

DENMAN C. J. It is an established rule of practice, that no application for a criminal information can be made against a magistrate for any thing done in the course of his office, without previous notice. It is true, that in this case, some acts attributed to the defendant are such as any individual, not a magistrate, might be indicted for. Whether we should have
granted

granted a criminal information for such acts alone may be doubtful. As some of the acts stated in the affidavits do affect this defendant in the character of a magistrate, the case falls within the general rule which requires notice. The rule for the criminal information must be discharged.

Rule discharged.

1833.

The KING
against
HEMING.

The KING *against* The Justices of the West Riding of YORKSHIRE. *Thursday, Nov. 14th.*

(*BOWER against* The Accounts of the Commissioners of MELTHAM Inclosure.)

A RULE nisi had been obtained for a mandamus calling upon the Justices of the West Riding to enter continuances and hear the appeal of *James Bower* against the accounts of *Frederick Robert Jones* and *Joseph Taylor*, the commissioners for inclosing lands in the manor of *Meltham* in the said riding, which accounts purported to have been examined and signed by certain justices of the riding, on certain days in 1831 and 1832. It appeared by the affidavit in support of the rule, that the accounts were passed under an act, 11 G. 4. and 1 W. 4. c. 49., private, for amending a former act respecting the *Meltham* inclosure. By the act of W. 4. it is provided (sect. 20.) that "if any person shall think himself aggrieved by any thing done, or omitted to be done, in pursuance of this act or the said recited acts, or either of them, he may By statute, parties were enabled in certain cases to appeal to the quarter sessions for a particular district, giving ten days' notice. The act said nothing as to further notice in the event of such appeal being respited, nor did it appear that there was any rule of practice on the subject at those sessions. An appeal under the statute, of which due notice had been given, was respited, and came on at a subsequent session, pursuant to the respite. The appellant was called upon to prove that he had given notice of trial of the respited appeal, and on his failing to do so the appeal was dismissed: Held, that the sessions were wrong in requiring such notice, and that the case was one in which this Court might over-rule their decision. Mandamus granted to hear the appeal

1833.

—
The KING
against
The Justices of
the West
Riding of
YORKSHIRE.

appeal to any general or quarter sessions of the peace, to be holden for the west riding of the county of *York*, within four calendar months next after the cause of complaint shall have arisen, giving to the said commissioners, and to the party or parties concerned, notice in writing of such appeal and of the matter thereof, ten days at least before such general or quarter sessions (except with respect to the accounts of the said commissioners), which, notwithstanding the same shall have been examined and published as aforesaid, may be appealed against at any time within six calendar months after the date of the award of the said commissioners, on giving to the said commissioners such notice as last aforesaid." Notice of the present appeal was given in due time for the quarter sessions holden at *Wakefield* in *January* 1833; and due notice was afterwards given that the appellant would move at those sessions, that the appeal might be respited to the next general quarter sessions to be holden at *Pontefract*, and also that the said accounts might be referred to a justice of peace, or some other person, to be by him examined and balanced. The respite was moved for and granted, but the respondents would not agree to refer the accounts. The *Pontefract* sessions were holden on the 3d of *April*, and the 11th of that month was appointed for hearing the appeals. On the said 3d of *April* the appellant gave notice to the respondents, that he should again move to respite the appeal till the following sessions, on the grounds that the commissioners had not passed the whole of their accounts, and that the bills of their clerk had not been delivered in and taxed. The respondents on being served with such notice did not say that they should prepare to try the appeal, or should oppose the respite. The motion for a respite

was made on the 11th of *April*, and adjourned to the 12th, when it was renewed, and the appellant again proposed a reference of the accounts, which the respondents would not agree to. The chairman intimated that the appeal must be called on in its turn, and that if the appellant was not prepared to try, it must be struck out. The appeal was then called on, and the majority of the bench having refused to respite, and the respondents declining to refer, except upon terms disapproved of by the appellant, the appellant's counsel said he would go on with the appeal. The respondents then called upon him to prove his notice of appeal for the *Pontefract* sessions. No such notice had been given, or considered necessary, by the appellant; and the sessions, in consequence, dismissed the appeal. In an affidavit made by one of the respondents in opposition to the rule, it was stated that the appeal was originally entered and respited at the *October* sessions 1832; that the deponent on receiving notice of a motion to be made at the *Pontefract* sessions for a further respite, gave no intimation that he should not prepare to try, and did in fact so prepare; that the appellant's counsel in the course of his application to the court at *Pontefract* on the 12th of *April*, admitted that he was unprepared to try; and that although one of the counsel for the respondents called upon the appellant's counsel to "prove his notice," the point as to notice of appeal to the then sessions was not raised or decided, and the appeal did not go off on that ground, nor was the trial of the appeal at all pressed on the court.

1833.

The KING
against
The Justices of
the West
Riding of
YORKSHIRE.

F. Pollock, Milner, and Dundas, now shewed cause.

There was no real hardship on the appellant in this

X x 3

case

1833.

The King
against
The Justices of
the West
Riding of
YORKSHIRE.

case being dismissed, for it is evident he had not intended, and was not prepared, to try. He was bound, if he intended proceeding, to give ten days' notice before the *Pontefract* sessions. The justices, upon hearing both sides, were of opinion that he was not entitled to respite, and as he had not given the necessary notice to enable him to proceed, they had a right to dismiss the case. They are the proper judges of matters of practice arising at their sessions, and their decision on such points, unless manifestly wrong or unjust, ought not to be interfered with. This Court held so in a case like the present, *Rex v. The Justices of Essex (a)*. [*Patteson J.* The appellants there had not given notice to try at the first sessions, the order having been served too late to enable them to do so.] In *Ex parte Becke (b)*, where the sessions had refused to adjourn an appeal at the appellant's instance on account of the absence of a witness, and the appellant consequently suffered the order to be confirmed, this Court refused to interfere with the decision of the justices.

Blackburne contra. The original notice of appeal gave the respondents every necessary information, and they were present when the respite to *Pontefract* sessions was granted. There was no occasion for a ten days' notice at each sessions, after the appeal had been so respited. *Rex v. Lambeth (c)*, *Rex v. The Justices of Buckinghamshire (d)*, *Rex v. The Justices of Hertfordshire (e)*. In *Rex v. The Justices of Lancashire (g)*, where the sessions had dismissed an appeal on the ground of insufficiency of

(a) 2 *Chitt. Rep.* 385.(c) 3 *D. & R.* 340.(e) 4 *B. & Ad.* 561.(b) 3 *B. & Ad.* 704.(d) 6 *D. & R.* 142.(g) 7 *B. & C.* 691.

notice,

notice, and a mandamus was moved for, Lord *Tenterden* said, "We think that justice will be most satisfactorily administered by ordering the justices to enter continuances and hear this appeal. They certainly have a discretionary power to make rules for the governance of the practice at the sessions, but the case cited (*Rex v. The Justices of Wilts (a)*) shews that this Court, for the purposes of justice, will interfere to control that discretion." [*Parke J.* I do not quite approve of the language held in that case. If the sessions have a discretionary power on the subject, this Court has not. The sessions are the judges of what is reasonable notice, but not the sole judges, and therefore this Court may interfere with their decision upon it. They are, by law, to hear appeals only on reasonable notice, of which we, as well as they, are judges. But it is not correct to say that this Court sets its discretion against theirs.]

1833.

—
The King
against
The Justices of
the West
Riding of
YORKSHIRE.

DENMAN C. J. I have always understood that this Court had authority to interfere for the purpose of seeing that no illegal practice prevailed at the sessions to prevent the hearing of an appeal. In this case the appeal was regularly brought in the first instance, and due notice given: it was then respited to a subsequent session, and an application was there made by the appellant for a further respite. Of that application the respondents had had sufficient notice to prevent their being put to expence in preparing to try at that session. The respite was not granted, and the appellant was then called upon to prove his notice. The affidavit in opposition to this rule would render it doubtful whether

(a) 10 *East*, 404.

1833.

The King
against
The Justices of
the West
Riding of
Yorks.

the challenge to prove the notice referred to the original notice of appeal, or to a notice to try at that session; but the affidavit on the other side states clearly that the latter was mentioned. I think it is pretty evident that by refusing this mandamus, justice would be shut out; and that we ought therefore to tell the magistrates that they have done wrong in refusing to hear the appeal upon the ground assigned. The rule will therefore be absolute.

PARKE J. The province of this Court in such a case as the present is clear. We have no right to interfere with the discretionary power of the sessions; where they have that power, their discretion is to be confided in. But the question, what is such reasonable notice as gives them jurisdiction to entertain an appeal, is a legal question, of which they are not the exclusive judges; and this Court will see that, in determining such a point, they act legally, and according to the jurisdiction which they possess. Now the statute 1 W. 4. c. 49. s. 20. enables a party to appeal, giving notice of such appeal ten days at least before the sessions. A person giving such notice has a right to have his appeal heard, and in this case it is sworn that the notice was given. At the sessions to which that referred, the appeal was respited to the sessions at *Pontefract*, and there a further respite was moved for. If the justices had merely refused that respite and proceeded with the appeal, and if they had then called for proof of the proper notice and that only, I should say that this Court ought not to interfere with the exercise of their discretion, although such discretion might have been exercised harshly, and that their decision was one by which the subject must be bound. The only

only question then is, whether the notice they called for was the original notice of trial, in which case their proceeding was right, and the appellant ought to have been prepared to comply with their requisition; or whether it was a notice of trial for the then sessions. Upon the statements before us I think we must take it to have been the latter; and if so, the case of *Rex v. Lambeth* (a) shews that they were wrong in law, that the first notice was sufficient, and that proof of the other ought not to have been required.

1833.

—
The King
against
The Justices of
the West
Riding of
YORKSHIRE.

TAUNTON J. If the appeal had been dismissed on the ground of non-compliance with a call upon the appellant to prove the original notice of appeal, I should have thought that this Court ought not to interfere. But it appears on affidavit that the notice of which proof was required was a notice of trial of the respited appeal; and I have a suspicion also that the sessions were influenced by the refusal of the appellant to refer on such terms as the respondents would agree to. If they acted on either of these grounds, their decision was illegal. I do not find that either the statute 11 G. 4. and 1 W. 4. c. 49., or any rule of practice at the sessions, requires notice of trial of a respited appeal. It appears to me that justice will be best satisfied by sending the case back to the sessions.

PATTERSON J. The statute requires ten days' notice of the appeal to be given in the first instance, but says nothing as to notice of a respited appeal. If that is necessary, it must be so either by the practice of the sessions, or by general rules of law. No rule of practice

(a) 3 D. & R. 340.

at

1833.

The King
against
The Justices of
the West
Riding of
YORKSHIRE.

at the sessions has been produced requiring such notice; if any had been shewn, it might perhaps be too much to say that a decision according to the practice was illegal and not to be abided by. As to the general rules of law, *Rex v. Lambeth (a)* shews that they do not warrant the demand of such a notice. The only question then is, whether the notice which the sessions required to be proved was that of the original, or that of the respited appeal? and I think, upon the statements before us, that it must have been the notice to try at the then session.

Rule absolute.

(a) 3 D. & R. 340.

SMITH against TOPPING.

The bankrupt act, 6 G. 4. c. 16. s. 72., vests in the assignees such goods whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of A. until the day before he became bankrupt, and then demanded the possession of them, which A. refused to deliver: Held, that they did not pass to A.'s assignees.

TROVER for the value of three pipes and three hogsheads of wine. Plea, not guilty. At the trial before *Alderson J.* at the *York Spring assizes 1833*, the jury found a verdict for the plaintiff for 700*l.* damages, subject to be reduced as hereinafter mentioned, and also subject to the opinion of this Court on the following case.

The plaintiff was a merchant at *Hull*. The defendant was the assignee duly appointed of one *Robert Lundie*, who, before his bankruptcy, was a merchant at *Hull*. The following facts as to the ownership of the wine were agreed upon at the trial, viz. 1st, that the plaintiff was the true owner of the wine; 2dly, that for some time previously to

the

the 21st of *July* 1831 the wine had been deposited by the plaintiff in the cellars of *Lundie*, and was and remained in his possession as the reputed owner thereof, with the consent and permission of the plaintiff the true owner thereof, within the seventy-second section of the bankrupt act, until the demands hereinafter mentioned, and also until the time of *Lundie's* bankruptcy hereinafter mentioned, unless the Court should be of opinion, that these demands determined such consent and permission. On the 21st of *July*, intelligence having reached *Hull* that certain persons, with whom *Lundie* was supposed to be involved in bill transactions, had stopped payment in *London*, Mr. *Hare*, a clerk of the plaintiff, went to *Lundie's* house about a quarter past eleven in the morning, and demanded the wine from a clerk called *Hunter* (*Lundie* being from home); but *Hunter*, after consulting with *Lundie's* sister, who lived in his house, refused to deliver up the wine until *Lundie's* return. He returned soon afterwards, and about one o'clock on the same day, *Hare* again called at the house and saw *Lundie* himself, and required the plaintiff's wine to be delivered up to him (*Hare*). *Lundie* said, "It was an unfortunate affair, he feared it would go to a bankruptcy, and that he did not know how he could act without consulting his attorney, but that to give up the wine would be shewing an undue preference." *Hare* said, "We are not creditors, the wine was not sold to you." *Lundie* went away for a few minutes, and upon his return said that he would not deliver up the wine. On *Friday*, the 22d of *July*, *Lundie* committed an act of bankruptcy, upon which a commission was afterwards sued out, and he was duly declared a bankrupt, and the defendant appointed his assignee, who thereupon took possession

1833.

SMITH
against
Topping.

1893.

Sutton
 against
Terring.

possession of the wine in question. Previous to the commencement of this action, viz. on the 7th of *January* 1832, a demand was made by the plaintiff upon the defendant to deliver up the wine, and he refused to do so. The plaintiff was absent from home when the demand of the wine was made by *Hare*; who had then been thirteen years in the plaintiff's service. The plaintiff lived in the country, and was frequently from home. In his absence *Hare* transacted his business; he opened his letters and answered them, and had the plaintiff's authority so to do. He did not sell goods or draw or indorse bills of exchange for him, nor was he empowered to do so. He saw the plaintiff the following week after the demand of the wine, and told him of it, and he approved of his having made the demand.

The question for the opinion of the Court was, whether the demand made upon *Lundie*, upon *Thursday* the 21st of *July*, prevented it from passing to the defendant (his assignee) by virtue of the seventy-second section of the bankrupt act (6 G. 4. c. 16.). The case coming on for argument this term (a),

S. Martin, for the plaintiff, was stopped by the Court. [*Parke* J. The bankrupt was a tortious holder of the wine at the time of the act of bankruptcy, he did not hold it with the consent of the true owner and proprietor.]

Tomlinson for the defendant. *Hare* had no previous authority from the plaintiff to make the demand of the wine, and before his act had been ratified by the

(a) *November* 19th, before *Parke*, *Taunton*, and *Patteson* Js.

plaintiff, the interest of third persons had intervened. [Parke J. It is stated that, in the plaintiff's absence, Hare transacted his business, opened his letters and answered them, having the plaintiff's authority so to do. From that a jury might fairly infer, that Hare had authority to demand the wine.] It is found only that Hare was the plaintiff's clerk, not that he was a salesman, or had any authority to buy or sell goods; but independently of that point, in *Darby v. Smith (a)*, where persons to whom certain household furniture had been assigned in trust, had permitted it to remain so long in the possession of the bankrupt, as to give him the reputed ownership of it in the opinion of all who dealt with him, and the trustees took possession of it on the eve of the bankruptcy, it was held that such a repossession was fraudulent against creditors; and in *Ex parte Smith (b)*, Leach Vice-Chancellor recognised that case as having been properly decided, on the ground that the property was withdrawn in contemplation of bankruptcy. [Parke J. The Vice-Chancellor seems to have considered it as something in the nature of a fraudulent preference.] It is not necessary to put it on that ground, but the principle upon which a party leaving property in the apparent ownership of a bankrupt loses it, is, that by so leaving it, he suffers the bankrupt to acquire credit. The same degree of credit is acquired whether the property be removed immediately before, or not until, the act of bankruptcy.

PARKE J. This is a very plain case. It is perfectly clear that the assignees of a bankrupt are not entitled to recover goods under the 6 G. 4. c. 16. s. 72. unless the

(a) 8 T. R. 82.

(b) *Buck's B. C.* 149.

bankrupt

1833.

SMITH
against
TOPPING.

1833.

SMITH
against
TORTURE.

bankrupt *at the time he became bankrupt* had the possession of the goods by the consent and permission of the true owner. The dividing point is the act of bankruptcy. Now here, on the day before the bankruptcy, *Hare*, a clerk who usually transacted the plaintiff's business in his absence, applied at *Lundie's*, the bankrupt's, office, for the wine, and *Lundie's* clerk refused to deliver it. Then, if the demand of *Hare* was equivalent to a demand by the plaintiff, the bankrupt had not the possession of the goods at the time when he became bankrupt *with the consent of the true owner*; and as we may draw from the facts such inferences as a jury might, I think we must say that *Hare* had authority to make the demand. That being so, the plaintiff is entitled to recover.

TAUNTON J. concurred.

PATTERSON J. I am of the same opinion. The attempt on the part of the defendant is to satisfy us that an express dissent is a consent.

Judgment for the plaintiff.

The KING against TREGARTHEN.

A party gave information on oath before a magistrate, that from certain language used towards him he

was in bodily fear from another; and the magistrate, upon hearing the complaint, required the latter to enter into recognisances to keep the peace. On motion to discharge the recognisances, on the ground that the language was used in a metaphorical sense only, the Court refused to interfere, because it was for the magistrate to judge in what sense the language was used.

THE defendant and one *William Matthews*, being rival sail-makers at *Penzance* in *Cornwall*, and meeting there on the 30th of *October* 1833, the defend-

ant,

ant, addressing *Matthews*, said,—“ The rod (alluding to an expression said to have been used by *Matthews* towards the defendant) you have in pickle for me, you must prepare yourself to receive such a castigation with as you deserve; and I am determined you shall have it.” Some altercation then passed between the parties; and, on the same day, the defendant sent a letter to *Matthews*, containing the following expressions:—“ The rod you have had so long in pickle for me is now so well saturated, that it is, in every respect, complete and fit for use; and, instead of applying it to my shoulders, you must now prepare yourself to receive such a castigation as your dastardly cowardice and intriguing designs most justly merit. I will no longer scruple to expose your infamous conduct.” The letter then proceeded to give several instances in which the writer alleged *Matthews* to have been guilty of fraud in the trade of a sail-maker, and challenged *Matthews* to meet those charges. On the following morning the defendant was summoned to attend before the mayor of *Penzance*, to be bound over to keep the peace on the application of *Matthews*, founded on the above conversation and letter: he accordingly attended at the office of the town clerk, when, the conversation and letter having been sworn to by *Matthews*, he was asked by the town clerk whether, from the language, threats, and letters of the defendant, he was not in bodily fear from the defendant; and *Matthews* having answered in the affirmative, the defendant was compelled to enter into a recognisance of 100*l.* himself, and two sureties of 50*l.* each, to keep the peace towards *Matthews* for six months.

1833.

The King
against
TREASHER.

CASES IN MICHAELMAS TERM

1833.

The King
against
TASSELTON.

Cowling moved for a certiorari to remove the recognisances and information taken, in order that the recognisances might be discharged, or the amount reduced; and contended that the magistrate had not jurisdiction to require recognisances, the words used not importing any threat of bodily injury. [*Parke J.* We cannot interfere where the magistrate has exercised his discretion, if he has proceeded on a sufficient information on oath.] The information was not sufficient. *Matthews* swore generally, in answer to a question put to him by the town clerk, that, from language, threats, and letters received from the defendant, he was in bodily fear. Now the language used, "The rod you have had in pickle for me," &c. was used in a metaphorical sense; and coupled with the explanation contained in the letter, could afford *Matthews* no ground to fear bodily injury. [*Taunton J.* You say that the charge in the information, that *Matthews* was in bodily fear, was not proved by the facts, because the language was used in a metaphorical sense; but the mayor of *Penzance* had a right to exercise his judgment whether it was used metaphorically or not.]

PARKE J. (a) The magistrate having, in the exercise of his discretion, thought that there was ground for requiring the defendant to enter into recognisances to keep the peace, this Court cannot interfere.

TAUNTON and PATTESON Js. concurred.

Rule refused.

(a) *Denman C. J.* was at the Privy Council.

1833.

In the Matter of JOHN WALLER POE.

PRICE, on a former day of this term, moved for a rule to shew cause "why a prohibition should not issue to the judge-martial and advocate-general of his Majesty's forces, to restrain the execution of the sentence of a court-martial," passed under the following circumstances : —

A prohibition cannot issue to a court-martial, after its sentence has been ratified by the king and carried into execution.

A prohibition cannot issue to a court-martial, after its sentence has been ratified by the king and carried into execution.

John Waller Poe, on whose behalf the application was made, was arraigned and tried before a general court-martial, held in the garrison at *Chatham* on the 26th of *August* 1833, and continued by adjournment till the 11th of *September* following, on a charge, "That he the said *J. W. P.*" (described as Lieutenant *J. W. P.* of the 55th regiment), "being a passenger on board the ship *Cæsar* on her passage from *Calcutta* to *England*, was, on or about the 12th of *February* 1832, accused of stealing a five pound Bank of *England* note, and certain articles of wearing apparel, the property of one *Thomas Ross* then acting as his servant, and which property the said *T. R.* alleged had been taken out of his trunks in his the said *J. W. P.*'s cabin; and the aforesaid accusation against the said *J. W. P.* having been thereupon enquired into by Captain *Watt* commanding the ship, by Lieutenant Colonel *Cunningham* and other officers on board, they the said officers and passengers forthwith expelled the said *J. W. P.* from their table and society; not permitting him to enter the general cabin, or to have any association whatever with them during the remainder of the voyage: nevertheless, the said *J. W. P.*, under cir-

VOL. V. Y y cumstances

1833.

In the Matter
of Pot.

cumstances so degrading and disgraceful to him, neither then, nor at any time afterwards, took any measures to become an officer and a gentleman to vindicate his honour and reputation; all such conduct as aforesaid being to the prejudice of good order and military discipline." The said *J. W. P.* objected, before and at the trial, that the charge against him did not, expressly or constructively, impute any military offence, or infraction of any of the articles of war, or any positive act of misconduct or neglect, to the prejudice of good order and military discipline; nor was there any thing in the said charge, if true, so far as it averred any fact, which subjected him to be arraigned or tried as a military officer. The Court, however, proceeded with the trial; and, after deliberating upon the charges, came to the following decision, which they transmitted to the commander-in-chief: — "The Court having maturely weighed and considered the evidence adduced in support of the prosecution, together with the prisoner's defence, and the evidence adduced in support of it, is of opinion that the prisoner is guilty of the whole of the charge produced against him, in breach of the articles of war. The Court does, therefore, sentence him, the prisoner Lieutenant *J. W. P.* of the 55th regiment of infantry, to be dismissed from his Majesty's service. The Court, in coming to the above finding and sentence, trusts it may be allowed to add, that it has considered the charge produced against the prisoner entirely in a military point of view, as affecting the good order and discipline of the army; and that it does not mean, by its sentence, to offer any opinion as to the original charge of theft, of which the prisoner was accused by the man *Ross*." The sentence was confirmed by the king, and carried into execution. The

said

said *J. W. P.* at the time mentioned in the above charge was proceeding home as a private passenger on board the *Cæsar*, on leave of absence from his regiment for two years.

1833.

—
In the Matter
of Fox.

Price, in moving for the rule. The offence charged in this case was not within the articles of war, and therefore could not be tried by a court-martial, the Mutiny Act, 3 & 4 W. 4. c. 5. s. 5., only empowering his Majesty to appoint courts-martial "for bringing offenders against the articles of war to justice." The seventieth clause of those articles may, perhaps, be cited in answer, which directs that "all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the foregoing cases, or in our articles of war, shall be taken cognizance of by courts-martial, according to the nature and degree of the offence." But, as Lord *Coke* intimates, (in speaking of the president and council of the North, instituted by *Henry* the Eighth,) a court cannot legally exercise an authority which rests on vague and undefined instructions, and such as cannot be understood by the subject, 4 *Inst.* 245, 246. There is nothing in itself disgraceful in the fact charged upon this party; it is merely that he was accused of an offence: it does not appear that, after the ship arrived in this country, the accuser had done any thing to make good his charge, or the accused had had any opportunity to take steps for his own vindication. [*Denman* C. J. Does any thing now remain to be done by the court-martial?] In *Grant v. Sir Charles Gould* (a), the court-martial had reported to the king; but there a prohibition was moved for, to prevent the execution of

(a) 2 H. Bl. 69.

1833.
 ———
 In the Matter
 of Fox.

the sentence; and it is clear, from the judgment of Lord *Loughborough*, that in his opinion the prohibition would have lain, if the case had not proved (as it ultimately did) to be within the jurisdiction of that Court. The sentence there, as to one part of it, viz. degradation from rank, must have already taken effect when the application was made. The finding of the Court had been confirmed by the king, as in the present case. [*Parke J.* Here nothing remains to be done in execution of the sentence.] The party may be restored to his rank, which is often done in such cases after a nominal dismissal. [*Taunton J.* To whom is the prohibition to be addressed?] It may go to the judge-martial. [*Denman C. J.* What are we to prohibit him from doing?] From enforcing the sentence. It is a continuing sentence. The Court may be re-assembled to revise it. [*Taunton J.* The ordinary course, where a party thinks himself aggrieved by the decision of a court-martial, is, to draw up a memorial to the king, which is then referred to the judge-advocate, and, as I think I can state with certainty, undergoes a most minute and elaborate investigation in his office (a). *Denman C. J.* Is there any instance in which this court has interfered by prohibition, after the sentence of an inferior court had been fully carried into effect? *Parke J.* If we granted the writ under such circumstances, there would be no case, in which the party was still alive, where an application like the present might not be made to this court. I, for one, should pause before I established such a precedent.]

The Court, however, allowed the case to stand over, in order that *Price* might look into the authorities with

(a) See, as to the revision of sentences on memorial to the king in council, the case of *Lieut. Frye*, 1 *Macarthur on Courts-Martial*, Appendix, No. xxiv. 4th edit., and the case of *Capt. Coffin* in the same work, vol. ii. p. 290., where the memorial was referred to the twelve Judges.

reference to the question last put by the Lord Chief Justice. And, on a subsequent day (*November 8th*),

1833.

In the Matter
of Fox.

Price, being desired by the Court to name any authorities which he had found applicable to the point (but without re-arguing the case), mentioned the following: 2 *Inst.* tit. *Articuli Cleri*, sect. 3. p. 602.; same title, sect. 14. p. 609. The resolution of the Judges in *Sir John Bennet v. Dr. Easedale* (a), that a sentence of the Star-chamber, making the plaintiff incapable of any office of judicature, "never took from him the office, but the execution thereof, nor gave authority to place others." *Isabel Peel's case* (b), *Walker v. Adams* (c), *Scarborough v. Justus Lyrus* (d), *Fitzherbert*, N. B. 45 F. 106 D. The form of a writ of prohibition in *Regist. Brev.* 38., concluding "et si quid per vos minus rite in hac parte attentatum fuerit, id sine dilatione revocari faciatis." Similar forms, *Regist. Brev.* 39, 40. 43. *Home v. Earl Camden* (e). [*Parke J.* The king has ratified the sentence of dismissal in this case; and he might also have dismissed the officer without any court-martial.] *Home v. Lord Bentinck* (judgment of *Dallas C. J.*) (g) furnishes an answer to this observation. Where a court-martial has, in fact, been held, this Court may restrain its proceedings by prohibition, whatever might be the case if a different course had been adopted. [*Parke J.* also referred to the authorities cited in *Com. Dig. Prohibition*, D., particularly *Hall v. Norwood* (h), as making against the present motion.]

Cur. adv. vult.

(a) *Cro. Car.* 55.

(b) *Cro. Car.* 113.

(c) 1 *Sid.* 331. 2 *Keb.* 200. 215. 227.

(d) *Latch.* 252, where the decision was against the prohibition.

(e) 2 *H. B.* 533.

(g) 8 *Price*, 249.

(h) 1 *Sid.* 166.

1833.

In the Matter
of Fox.

DENMAN C. J., in the same term (*November 14th*), delivered the judgment of the Court.

An application was made for a rule to shew cause why a writ of prohibition should not issue, prohibiting the execution of the sentence of a court-martial, which, in the month of *August*, had been holden at *Chatham*, on charges preferred against an officer in the 55th regiment, on the ground that the facts alleged in the charge were insufficient to bring the party within the articles of war. In the course of the statement it appeared that a commission had been directed to certain officers, for the purpose of carrying on this enquiry; that witnesses had been examined, and the trial proceeded to its termination; that the Court had pronounced the defendant guilty, and sentenced him to be dismissed from his Majesty's service, and, finally, that that sentence had been ratified and approved by the king, who had accordingly dismissed the applicant from the army. We could not understand why, and to what end, a prohibition should be granted, nor to whom it could be directed, nor what it could prohibit; for not only had the sentence been carried into complete execution, but the court-martial itself, having performed all its functions, had ceased to exist. The learned counsel, however, argued that the writ might be directed to the Judge Advocate, as in the case of *Grant v. Gould* (a), which case, or rather some parts of Lord *Loughborough's* elaborate judgment upon it, were supposed to furnish authority for granting this rule. We may here observe, that the rule for a prohibition was there discharged, on its being satisfactorily proved that no valid objection to the proceedings of the court-martial existed, and no-

(a) 2 H. Bl. 69.

thing was said respecting the person to whom it was addressed; otherwise it is not easy to see what power the judge-advocate could possess after the sentence had been reported to his Majesty, and received his royal approbation; and the prayer of the suggestion is remarkable in humbly imploring that "the writ may be directed to Sir *Charles Gould* the judge-advocate, or to *some other competent person* or persons, to hinder him from proceeding in ordering the execution of the sentence." That case clearly falls short of the purpose for which it was cited, as the sentence was not fully executed, and this fact is stated in the affidavit on which the rule was founded.

1833.

In the Matter
of Pos.

We, therefore, desired to be furnished with some authority (if any could be found) for granting a prohibition, after complete execution of the sentence imposed by the inferior court; and several cases were, at a subsequent day, laid before us; none of which, however, on examination, appear to us to establish the proposition, while others are examples of acting on the contrary doctrine. In *Hall v. Norwood* (a) the Court held that a motion for a prohibition came too late after judgment and execution in the Court below, because there is no person who can be prohibited. And a similar view is taken in *Darby v. Cosens* (b), by *Ashhurst* and *Buller* Js., the only judges in court, who support the prohibition on the ground that something remained to be done. But it is needless to enter at large into the law of prohibition in general, for a court-martial stands on grounds peculiar to itself. When it pronounced its sentence, it ceased to exist (c). To the judge-advocate no other duty

(a) 1 Sid. 166.

(b) 1 T. R. 552.

(c) See, however, 1 *Macarthur on Courts-Martial*, p. 262. 4th edit.; in which it is said that military courts-martial remain in existence till dis-

1833.

In the Matter
of Fox.

duty then belonged than that of transmitting the sentence for approbation; and even supposing the case of *Grant v. Gould* to furnish some argument that a writ of this nature might be directed to him before execution of the sentence, still it is impossible to discover what he could be required to abstain from after execution. If, then, the writ were to issue at all, we see no court or individual to whom it could be addressed other than the king himself, who, acting on the sentence, has been pleased to dismiss the officer from his service. Now, admitting for a moment that it were possible to address any writ directly to his Majesty, when it is considered that this power is undoubtedly inherent in the crown, and might have been lawfully executed even without any court-martial, it will at once appear manifest that no prohibition can lie in such a case. For what the king had power to do, independently of any enquiry, he plainly may do, though the enquiry should not be satisfactory to a court of law, or even though the court which conducted it had no legal jurisdiction to enquire.

We do not think it necessary to consider whether the charge that has been tried is so framed as to bring the party within the articles of war; but we agree with Lord *Loughborough's* remark in *Grant v. Gould*,—"It would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction by a justice of the peace." We are all clearly of opinion that the rule moved for cannot be granted.

Rule refused.

solved by the same authority by which they were held; and the reason given is, that they may be directed to revise the sentence, or to intimate publicly in court to the person tried, his Majesty's pleasure, or that of the commander-in-chief. See also p. 131. and Appendix, No. iv. (Orders in Lieut. *Jephson's* case) in the same volume.

1833.

DOE on the Demises of ANDREW PRITCHARD
and Others against DODD.

ON the trial of this ejectment before *Denman C. J.*, at the sittings in *Middlesex* after *Hilary* term 1833, a verdict was found for the plaintiff, but leave given to move to enter a nonsuit, which motion was made in the ensuing term, and a rule nisi granted. Upon shewing cause against the rule, the only point which it is deemed necessary to notice arose on the construction of the following lease; the defendant's counsel insisting that it was a lease for the life of *John Pritchard* therein mentioned; and the plaintiff's counsel, that it was for the life of *John Adams* the lessee, who died in *J. Pritchard's* lifetime.

The lease purported to be made on the 24th of *May* 1816, between *Zachariah Kemp* and *James Corrick*, assignees of the estate and effects of *John Pritchard* the younger, a bankrupt, of the first part; the said *John Pritchard* of the second part; and *John Adams* of the third part; and it began with the following recital:—
“Whereas, by an agreement in writing (a), bearing date the 4th day of *December* 1807, the said *John Pritchard* agreed to let, and the said *John Adams* agreed to take, all that piece or parcel of land and premises hereinafter particularly mentioned, and hereby leased and demised, or mentioned or intended so to be, from *Christmas* day then last, for the term of his natural life, and the said *John Adams* agreed to lay out and expend

Where *A.* demises to *B.* for the term of his natural life, the demise is, *prima facie*, for the life of *B.* But where *A.* demised to *B.*, his executors and administrators, for the term of his natural life, and the lease contained a covenant by *A.* for quiet enjoyment of the premises by *B.*, his executors, &c. during the natural life of *A.*:

Held, that the word “his” in the demising clause must be referred to *A.*, the grantor, and not to *B.*, though his name was the last antecedent.

(a) Not proved at the trial.

1833.

—
DOR dem.
PRITCHARD
against
DODD.

on the said piece or parcel of land 440*l.* in building, &c. as also the expenses of leases, &c. And the said *John Pritchard* agreed to grant a lease of the said premises when thereunto required." The indenture then further recited, that a commission of bankrupt had issued against *J. Pritchard*, under which he had been duly declared a bankrupt, and his estate assigned to *Kemp* and *Corrick*; and it then proceeded as follows: —

"Now this indenture witnesseth, that in pursuance and performance of the aforesaid agreement, and in consideration of the trouble and expense the said *John Adams* hath been at and put unto in erecting and building the messuages and tenements erected and built by him in pursuance of such agreement, on the said piece or parcel of land hereinafter leased and demised, or intended so to be, as also in consideration of the rents, covenants, and agreements hereinafter reserved and contained; and which, on the part and behalf of the said *John Adams*, his executors, administrators, or assigns, are to be paid, done, and performed, they, the said *℥. Kemp* and *J. Corrick*, at the request and by the direction of the said *John Pritchard*, testified by his being a party to and executing these presents, have, and each of them hath, demised, leased, set, and to farm letten, and by these presents do, and each of them doth, demise, lease, &c.; and the said *John Pritchard* hath also demised, &c., and by these presents doth demise, &c. unto the said *John Adams*, his executors, administrators, and assigns, all that piece or parcel of a field, called the *Clay Pit Field*, situate, &c. containing, &c. of which said piece or parcel of land the said *John Pritchard* was, and is, tenant for life under the will of *Andrew Pritchard*, late of, &c., and which is the same piece or parcel of
land

land and premises as was agreed to be leased by the said *John Pritchard*, to the said *John Adams* by the said agreement, on which the said *John Adams* hath already erected three messuages or tenements, together with all yards and gardens, &c., and appurtenances whatsoever to the said piece or parcel of land, messuages, or tenements belonging, or in any wise appertaining: To have and to hold the said piece or parcel of land, messuages, or tenements and premises, with all and every the appurtenances, unto the said *John Adams*, his executors, administrators, and assigns, from Midsummer-day now last past, for and during the term of his natural life, yielding and paying therefor, yearly and every year, during the continuance of the said term, determinable as aforesaid, unto the said *Z. Kemp* and *J. Corrick*, their heirs and assigns, the yearly rent," &c.

Then followed a covenant by *Adams*, for himself, his executors, administrators, and assigns, "at all times during the continuance of the term thereby demised, determinable as aforesaid," to pay the said rent to *Kemp* and *Corrick* on the stated days. Covenant, by and for the same parties, to repair and keep in repair the messuages erected, and that might be erected on the said premises, and the said premises, &c., so repaired, &c., "at the end of the said term, or other sooner determination of this lease by the death of the said *John Pritchard* or otherwise," peaceably and quietly to yield up to *Kemp* and *Corrick*, their heirs and assigns. Covenant for liberty to *K.* and *C.* to enter and view the state of repair, and to give notice of defects, which *Adams* bound himself, his executors, &c. to repair within three months after such notice. Covenant for the re-entry of *K.* and *C.*, their heirs and assigns, upon *Adams*, his executors, &c. if the rent

1893.

Doct dem.
PRITCHARD
against
DOBBS.

1833.

—
Dox dem.
PRITCHARD
against
Dodd.

rent should be in arrear, or repairs undone, &c. Covenant by *K. and C.*, and *J. P.*, for themselves, their heirs, executors, &c. to *Adams*, his executors, &c., that *Adams*, his executors, administrators, and assigns, paying the said rent and performing the said covenants, "shall and may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said piece or parcel of land, messuages, or tenements, and all other the said hereby demised premises with the appurtenances, *during the natural life of the said John Pritchard*, without any lawful let, suit, trouble, denial, eviction, &c. of, from, or by the said *W. Kemp*, *J. Corrick*, and *John Pritchard*, or any of them, or of, from, or by, any person or persons lawfully or equitably claiming by, from, or under, or in trust for them, or any of them."

Sir *James Scarlett* and *Comyn*, in this term, shewed cause against the rule, which was supported by *F. Pollock*. Every material observation upon the lease will be found in the judgments delivered by the Court.

DENMAN C. J. I thought, upon the trial, that the granting part of this lease was all that I could properly look to; and, referring to the name which stood as the last antecedent to the words "his natural life" in that part of the lease, it seemed to me that the whole must be construed as a grant of lease for the life of *John Adams* only, though there was every appearance of a different intention in other parts of the deed. But, looking to the covenant for quiet enjoyment, which expressly declares that the lessee shall occupy during the natural life of *John Pritchard*, to the evident intention of the whole instrument, and to the circumstance of

the

the demise and covenants being made to *Adams*, "his executors and administrators," I am now of opinion that the lease must be taken to have been granted for the life of *John Pritchard*, and not of that party whose executors and administrators are included with himself in the grant.

1833.

DOE dem.
PRITCHARD
against
DODD.

PARKE J. I am of the same opinion. I do not, however, think that the covenant for quiet enjoyment, in this deed, of itself constituted a demise for the life of *John Pritchard*. It is true that any words which express the intent of giving possession for a certain time may, in construction of law, amount to a lease; but here there is a regular lease by proper words of demise. The covenant for quiet enjoyment cannot operate of itself as a lease, though it may assist in construing that lease. The words of the demise are, that *Pritchard* doth demise, set, and to farm let, the premises unto the said *John Adams*, his executors, administrators, and assigns, from *Midsummer* day last, "for and during the term of his natural life." The next antecedent to "his" is certainly the name of *John Adams*; but the other words shew that the intention was to convey an interest, not merely to *John Adams*, but to his representatives after his death. It follows that the life contemplated was the life of *Pritchard*; and this construction is the most beneficial to the grantee. And then comes the covenant for quiet enjoyment, which shews clearly the intention of the grantor in the previous parts of the instrument.

TAUNTON J. The words of demise are certainly important, but they are not conclusive. When *A.* demises to *B.*, for the term of *his* life, the word "his" would, in ordinary construction, apply to *B.* as the last antecedent.

1833.

Doc dem.
PRITCHARD
against
DOND.

antecedent. But instances perpetually occur where that word is used, and does not refer to the last party named. The words of demise are, at most, ambiguous and being so, they may derive explanation from the other parts of the instrument. Then the covenant for quiet enjoyment during the natural life of *Pritchard* tends very strongly to expound the intention of the parties. It is not necessary to say that such a covenant would operate here as an actual demise; though it is a doctrine as old as the year-books (a), that a licence to enter and occupy land amounts to a lease. But the covenant, as it stands here, is a very strong proof of the intention to grant for *Pritchard's* life, and not that of *Adams*.

PATTESON J. The word "his" in the demising clause is ambiguous; but then comes the covenant, that *Adams* shall quietly enjoy during *Pritchard's* life, which alone would satisfy me that a lease for *Pritchard's* life was contemplated in the demising clause. The whole instrument, taken together, suggests that construction. The executors and administrators of *Adams* would not have been named if the demise intended had been only for his life.

Rule absolute.

(a) 5 H. 7. 1. *Bac. Abr. Leases*, (K), p. 817. 7th ed.

1833.

DOE dem. SMITH *against* BIRD and Another.

EJECTMENT for one fourth of several copyhold estates, situate in the manor of *West Walton cum Membris*, on the part of *Emneth*, and other manors in the county of *Norfolk*. A verdict was found for the lessor of the plaintiff, subject to the opinion of this Court on the following case: —

In the year 1777, Mrs. *Warren* (then *Elizabeth Southwell*), and her two sisters, *Frances* and *Mary*, were tenants in tail of part of the premises in question (being those comprised in the first count of the declaration), and tenants in fee of another part (comprised in the second count of the declaration), and also of certain freehold property. By a settlement in that year, made in contemplation of the intended marriage of Dr. *Warren* and the said *Elizabeth Southwell*, they, Dr. *Warren* and

A. and B., by a settlement made on occasion of their intended marriage (which afterwards took place), conveyed certain freehold estates to trustees, for the benefit of themselves and the survivor of them for life, then for the benefit of the issue of the marriage, if any, and if none, then to the use of such person as the wife by deed or last will, notwithstanding her coverture, and as if she was sole and

unmarried, should appoint, and in default of appointment, to the use of herself in fee. The wife, at the time of the marriage, was seised in tail of certain copyhold lands.

The husband and wife afterwards executed a power of attorney to *C.*, authorising him to surrender the copyhold lands of which the wife was seised in tail to a third person, in order to make him tenant to the præcipe or plaint, in a recovery intended to be suffered in the manor court. The wife, previous to her executing the power of attorney, was examined apart from her husband, by the deputy steward of the manor. The recovery was suffered, and immediately afterwards the premises were surrendered to the same uses as those mentioned in the marriage settlement: Held, that the power of attorney was valid as the act of the husband; he having sufficient interest in his wife's copyhold lands to pass them by surrender during the joint lives of himself and his wife; and that the recovery (which had stood unreversed for twenty years) was, therefore, well suffered.

After the above surrender, the wife was admitted to other copyhold lands, which were not surrendered to the use of her will. By her will, made in 1802, she devised her real and leasehold estates to certain persons therein named. At the date of her will and of her death she was seised of freehold estates: Held, that the will was a valid disposition of the copyhold which had been surrendered to the use of her will, though it did not refer to the surrender in which the right of disposition was reserved, and though it was made after she ceased to be a feme covert:

Held, further, that the copyholds which had not been surrendered to the use of the will did not pass by the general devise of the real estate, the will having been made before the 55 G. 3. c. 192.

E. Southwell,

1833.

Doct dem.
 SMITH
 against
 BIRD.

E. Southwell, conveyed to trustees, their heirs and assigns, their freehold and leasehold hereditaments to certain uses, and upon certain trusts, for the benefit of the said Dr. *Warren* and *E. Southwell*, during their lives, or the life of the survivor of them, and afterwards for the benefit of the issue of their marriage; and after the deaths of the said Dr. *Warren* and *E. Southwell* or the survivor of them, if they died without issue, then, as to the estates of the said Dr. *Warren*, to himself in fee, and as to the estates of the said *E. Southwell*, to the use and behoof of such person or persons, and for such estate or estates, &c. as the said *E. Southwell* by deed or will executed as in the conveyance was mentioned, should, notwithstanding her coverture, and as if she was sole and unmarried, direct or appoint; and for default of such direction, declaration, or appointment, to the use and behoof of the said *E. Southwell*, her heirs and assigns for ever. And by the same indentures the said Dr. *Warren* and *E. Southwell* covenanted that they or the heirs of the said *E. Southwell* would surrender all and every the copyhold lands, &c. wherein she had any estate, title, or interest, to the same uses, and for the same intents and purposes, as were thereinbefore expressed and declared of and concerning the freehold estates of the said *E. Southwell*. No surrender was ever made pursuant to the said covenant.

The marriage between Dr. *Warren* and *E. Southwell* was duly solemnised in 1777.

In 1779 the sister *Frances* died intestate, never having been married, and her surviving sisters, *Mary* and *Elizabeth*, were duly admitted to *Frances*'s third part of the lands mentioned in the first count of the declaration as co-heirs in tail.

At

At a general court baron holden for the said manor of *West Walton cum Membris*, on the part of *Emmeth*, on the 8th of *October* 1781, Dr. and Mrs. *Warren* and *Mary Southwell*, by *James Guy*, their attorney, by virtue of a power of attorney under their respective hands and seals, bearing date the 14th day of *July* 1781, (at the foot of which said power of attorney it was certified by the steward, that Mrs. *Warren* had been, previously to the execution of the said power of attorney, examined apart from her husband touching her consent to the several matters and charges therein contained and had thereunto freely consented,) surrendered into the hands of the lord of the said manor the entirety of such of the messuages and lands mentioned in the first count of the declaration as were holden of that manor, to the use of *H. Watts*, in order to make him tenant for the purpose of suffering a common recovery. Such recovery was afterwards suffered by *J. Guy*, Dr. and Mrs. *Warren's* attorney, wherein *W. Clarke* was demandant, the said *H. Watts* tenant, and the said Dr. *Warren* and *Elizabeth* his wife, and *Mary Southwell*, by *J. Guy*, their attorney, vouchees; and afterwards one undivided moiety of the said messuages and lands in the first count of the declaration mentioned, holden of the said manor, was surrendered by the demandant to certain uses for the benefit of Dr. *Warren* and *E.* his wife, and their issue, with remainder, in default of issue, to the use of such person, &c. as Mrs. *Warren*, by deed or will, should, notwithstanding her coverture, and as if she was sole and unmarried, declare or appoint, and in default of any such declaration or appointment, to the use of the heirs of the said *Elizabeth* for ever; and at the same Court the said

1833.

Dec dem.
Surrender
against
Eian.

1833.

Don dem.
Surren
against
Bian.

Elizabeth Warren was admitted according to the form and effect of the said surrender.

Common recoveries of the entirety of the other messuages and lands mentioned in the first count of the declaration holden of other manors therein mentioned, were suffered by Dr. and Mrs. *Warren* and *Mary Southwell*, under and by virtue of other letters of attorney previously executed by them; and which said other letters of attorney, by a memorandum at the foot thereof, signed by the deputy steward of the several manors, stated the private examination and consent of the said *E. Warren* previous to the execution thereof by her. None of the said recoveries were suffered by the parties in person: but the first recovery was suffered by *J. Guy*, attorney of Dr. and Mrs. *Warren*, and the others by *S. Draycott* their attorney, in each manor, by the said letters of attorney; and after the suffering of the recoveries one undivided moiety of the messuages and lands in the first count of the declaration mentioned, holden of the several last-mentioned manors respectively, was surrendered by the demandants in the said several recoveries to certain uses for the benefit of Dr. *Warren* and *Elizabeth* his wife, and their issue, with remainder, in default of issue, to the use of such person and for such estate as Mrs. *Warren*, by deed or will to be executed as therein mentioned, should, notwithstanding her coverture, and as if she was sole and unmarried, direct, declare, or appoint, and in default of such declaration or appointment to the use of the heirs of the said *Elizabeth* for ever. And at the same several courts Mrs. *Warren* was admitted according to the form and effect of the said several surrenders. All the

the court rolls in existence of the said several manors had been searched, and it appeared that, prior to the recovery suffered by Dr. and Mrs. *Warren*, there were many instances in which recoveries had been suffered by a feme covert *in person*, but none was found of a recovery suffered by a feme covert by attorney.

In the years 1781 and 1782, Dr. and Mrs. *Warren* surrendered the moiety of the lands (late of *Henry Southwell*) mentioned in the second count of the declaration, to the same uses as were specified in the marriage settlement.

In the year 1790, *Elizabeth Warren* and *Mary Southwell* were admitted to other parcel of the said lands, in the second count of the declaration mentioned, (therefore the property of *J. Marshall* deceased,) to hold to *E. Warren* and *M. Southwell*, and their heirs, in coparcenary, which last-mentioned lands were never surrendered to the use of the will of the said *Elizabeth Warren* in any way whatever. In 1800, Dr. *Warren* died, in the lifetime of his wife, without issue.

Mrs. *Warren* did not, in her lifetime, make any appointment by deed, nor did she make any other surrender to the use of her will than that above stated; but by her last will in writing, dated the 1st of *December* 1802, she devised (amongst other things) all her real and personal estate to *J. W. Smith*, the lessor of the plaintiff, and *S. Trafford*, their heirs and assigns, upon certain trusts therein mentioned; and by a codicil bearing even date with her said will, after revoking that part of her will as to the devise to *J. W. Smith* and *S. Trafford*, she devised in the words following:—"And as to all the rest and residue of my real estates, and also as to all my leasehold estates whatsoever, I devise and bequeath the

1833.

DOE dem.
SMITH
against
BIRD.

1833.

DOX dem.
SMITH
against
BIRD.

same unto my sister, Dame *Mary Eyre*, during the term of her natural life; and from and immediately after her decease, I devise and bequeath all my said real estates, and also all my said leasehold estates, unto and to the use of, and for the benefit of the said *J. W. Smith* and *S. Trafford*, their heirs, executors, administrators, and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants."

In 1816 *Mrs. Warren* died, being then, and having been, at the dates of her will and codicil, in possession of one undivided moiety of the several estates mentioned in the first and second counts of the declaration. She was also seised in fee of considerable freehold estates which passed by her will and codicil. Dame *Mary Eyre* died on the 18th of *November* 1825, whereupon Sir *J. W. Smith*, the lessor of the plaintiff, claimed to be entitled to one undivided fourth part of the said several messuages and lands in the first and second counts of the declaration mentioned, as devisee under the said codicil of *Mrs. Warren*. This case was argued in *Trinity* term 1833 (a).

Preston for the lessor of the plaintiff. There are two parts of the case: one, as to the entailed lands; and the other, as to the lands not entailed. First, as to the entailed lands, it may be contended that a customary recovery of copyhold cannot be suffered by attorney; but, assuming that the recovery is in that respect irregular, it is not absolutely void, but voidable only by application to the Lord's Court, 2 *Watkins on Copy-*

(a) Before Denman C. J., *Littledale*, *Parke*, and *Patteson* Js. June 4th.

holds,

holds, 24, 25.; *Ash v. Rogle and the Dean and Chapter of St. Paul's* (a); *Viner's Abr.* tit. *False Judgment* B. pl. 10. On principle the objection cannot be tenable, because otherwise a common recovery, except by special custom, could not be suffered in any case where the parties were so circumstanced, from ill health or otherwise, that they could not appear personally in Court. At common law, a person under such circumstances might appear per responsalem, *Bracton*, tit. *De Essoniis*, c. 14. fol. 361. In *Viner's Abr.* tit. *Recovery* (A. a.), "reversed, falsified, or stayed, for what and how," there is no instance in which it was merely objected to a recovery, that it was suffered by attorney. In *Wymer v. Page* (b) Lord *Ellenborough* was of opinion, that an attorney might be appointed for suffering a common recovery of copyhold lands, as of common right, unless there were an express custom to the contrary. [*Parke* J. There is sufficient evidence of a custom here to appoint an attorney, if that be necessary; the only question is, whether *Mrs. Warren*, a feme covert, could appoint an attorney.] The stat. 47 G. 3. sess. 2. c. 8. enables femes covert to appoint an attorney for the purpose of surrendering a copyhold, of which a common recovery is proposed to be suffered. But the recovery in this case was suffered before that statute. The 59 G. 3. c. 80. was passed to enable femes covert to appoint an attorney to appear for them as tenants to the plaint or writ, or as vouchees, in courts of ancient demesne, but that they might have done at common law, as appears from the passage already cited from *Bracton*. The general rule is, that every person

1833.

Doct dem.
Surren
against
Bract.

(a) *Vernon*, 367. *Shower's P. C.* 67. 1 *Eq. Ca. Abr.* 119.

(b) 1 *Stark. N. P. C.* 9.

1833.

Don dem.
Surrea
against
Bian.

may appoint an attorney ad prosequendum et defendendum, and there is nothing to shew that it does not apply to an inferior court (a). At common law the husband might appoint an attorney for his wife, though in some cases she might apply to the Court to appoint an attorney for her, on a suggestion that her husband was not doing his duty for her. The course in common recoveries in *Westminster Hall* is, that a writ of dedimus potestatem de attorney faciendo is granted to take the acknowledgment and examination of the parties, and the form of the proceedings is, "that A. B., and C. his wife, put in their place C. D. to be their attorney against D. E., to gain or lose in a ple of land;" and it is required by the rules of the Court that commissioners should examine the wife apart from the husband, and return a certificate to the Court that they have done so. Here there has been a letter of attorney executed by the husband and wife in the most ample manner authorising the surrender of the premises into the hands of the lord in order that he might regrant them. If the wife had appeared in Court, she could only have been asked by the Court if she consented; her assent testified by deed is as solemn an act as her declaration in open Court. It is true that a married woman cannot execute a deed; but the letter of attorney is not to be considered the deed of the wife, but a certificate to the Court that she had consented that another person should act as her attorney to suffer a recovery for her. In *Holland v. Jackson* (b), one of the errors assigned was, that the wife was within age at the time of the appearance of her and her husband

(a) See *Daubney v. Cooper*, 10 B. & C. 237.

(b) *Bridgman*, 69.; and see p. 73, 74.

by attorney, and also at the time of the judgment, but it was not assigned as error that she was a married woman at that time. So in an *Anonymous* case in *Dyer*, 262. upon a writ of false judgment, the objection was, that the tenant being within age made an attorney: but there never has been a case in which it has been objected that husband and wife made an attorney. The 10 & 11 *W. 3. c. 14.* enacts, "that no common recovery shall be reversed or avoided for any defect unless suit be commenced within twenty years after suffering the recovery." Equity would extend the analogy of that statute to the present case.

Then assuming that the recoveries in the manor courts were well suffered, another question is, whether *Mrs. Warren's* will was a good execution of the power reserved to her by the surrender of the copyholds to the lord in 1781. The first objection (which applies to all the copyhold lands) is, that the will could not operate as an execution of the power, because it contains no reference to it. The answer to that is, that the uses in the surrender, which authorised a will, were not in strict propriety of language a power, but merely a mode of obtaining a devisable interest over copyhold lands; besides, *Mrs. Warren* was also owner of the fee, and might as such devise her copyhold lands.

Then assuming that the words of the devise were sufficient to pass all the copyhold lands which had been surrendered to the use of her will, another question is, whether they are sufficient to pass those to which she was admitted in 1790, and which were not so surrendered. As *Mrs. Warren* had the ultimate fee which now confers the right of possession, and as she was living when the 55 *G. 3. c. 192.* was passed, that statute was equivalent to

1883.

Doa dem.
SMITH
against
BIRN

1893.

Doe dem.
Surren
against
Dud.

or superseded the necessity of a surrender to the use of her will, and rendered the language of her will as effectual as if there had been surrenders in the ordinary form to uses declared, or to be declared by her. Every disposition *made or to be made* by any will by any person who shall die after the passing of the act, is rendered valid without any previous surrender. It was doubted at one time, whether, since the statute, copyholds would pass under a general devise of real estate by a testator who had both freehold and copyhold lands, and who had made no surrender to the use of the will. But *Doe dem. Clarke v. Ludlam* (a) expressly decided that copyholds would pass under such a devise, and that it ought to receive the same construction as if the testator had made a surrender to the use of his will. The statute, therefore, places the testator in precisely the same situation as if he had made a surrender to the use of his will. And it is quite clear that if Mrs. *Warren* had made such a surrender, the copyhold lands to which she was admitted in 1790, would have passed under this devise.

Follett contra. First, Mrs. *Warren* could not devise the land of which she was seised in tail. There was no valid recovery, not because Dr. and Mrs. *Warren* could not appear by attorney, but because she being a feme covert was incompetent to execute a deed, and the surrender to the lord made by the attorney was void, and consequently there was no good tenant to the plaint in the manor court. It is said that this recovery can only be avoided by application to the lord's court; but *Roe v. Baldwere* (b) shews that this Court will

(a) 7 Bing. 275.

(b) 5 T. R. 104.

examine a recovery of copyhold as well as of other lands. In *Holland v. Jackson (a)*, the husband and wife appeared by attorney, and the question was whether the appearance by the wife, she being an infant, was error. That is not the question here. In *Watkins on Copyholds*, vol. i. 63., it is said that "the husband and wife may together surrender the wife's lands, she being on such surrender examined apart by the steward;" and in page 65., "when any one is authorized to surrender his copyhold, it is not always necessary he should do it in person; he may appoint in many cases an attorney for the purpose;" and then it is added, "where the copyholder is not under any personal incapacity, as *non compos*, *covert*, or *an infant*, and possesses a power which may be delegated to another; a surrender which is warranted by the general law of copyhold may be by attorney as well as in propria persona." The statutory provisions on the subject shew that a surrender by a married woman was not valid at common law. The 9 G. 1. c. 29. enables a feme covert to appoint an attorney for the purpose of admission to copyholds, and the 47 G. 3. sess. 2. c. 8. (A. D. 1807), for the purpose of suffering a recovery of them. Here the surrender and admission were long before the latter statute. The statute 10 & 11 W. 3. c. 14., which limits the reversal of a recovery to twenty years, does not apply to a case where there has been no good tenant to the præcipe or plaint. This is shewn by the 14 G. 2. c. 20. s. 5., which enacts, "that every common recovery shall, after the expiration of twenty years from the suffering thereof, be valid, if it appears upon the face of such recovery that there was a tenant to the writ, and if the person joining in the

1833.

Don dec.
Surren
examined
Barr.

(a) *Bridgman*, 69.

1833.

DOE dem.
SMITH
against
BIRD.

recovery had a sufficient estate to suffer the same, notwithstanding the deed making the tenant shall be lost." The case here is as if there had been a recovery in the superior court, and no good tenant to the præcipe: such a recovery would be void.

But, secondly, none of the copyholds, either in tail or in fee, which were surrendered to the use of her will, can pass by the devise, unless it be a valid execution of the power. The words are, "notwithstanding her coverture, and as if she were sole." That implies that the power was only to be executed while she was covert. And assuming that to be otherwise, if it is a power, the will or codicil does not refer to the power, and therefore is not a good execution of it; and there are other freehold estates to satisfy the words. It is said, that the right reserved to Mrs. Warren by the surrender, to make a will, is not a power, but merely a mode of obtaining a devisable interest over the copyhold lands. But a similar clause in a surrender was treated as a power by the Court of Common Pleas in *Driver v. Thompson (a)*. [Parke J. Here, in default of appointment, the copyholds are limited to the use of her and her heirs for ever. Now, assuming that the will may not be a good execution of the power given by the surrender, may it not operate on the reversion in fee vested in her in default of appointment? *Doe v. Hickman (b)*.]

At all events, the copyholds to which Mrs. Warren was admitted in 1790, and which were never surrendered to the use of her will, will not pass under the general devise of all her real and leasehold estates, she having, at the time of her will, freehold as well

(a) 4 Taunt. 294.

(b) 4 B. & Ad. 56.

as copyhold property. The question is, whether, at the time when she made her will, she intended that her copyhold, as well as her freehold, property should pass. The rule of construction is, that where a testator, having both freehold and other property, uses general words of devise, they are restrained to the freehold, unless a contrary intention appears. The words, "all my lands and tenements," are only applied to leasehold where the testator has no freehold property: *Rose v. Bartlett* (a), *Hartley v. Hurle* (b), and other authorities collected in 2 *Powell on Devises*, p. 127., 3d ed. The same rule applies to a general devise by a testator having both freehold and copyhold property: such devise is restrained in construction to the freehold property, unless there has been a surrender to the use of the will, and then such surrender has been held to shew a different intent; *Chapman v. Hart* (c), *Sampson v. Sampson* (d), *Nicholls v. Butcher* (e), *Tendril v. Smith* (g), *Goodwyn v. Goodwyn* (h), and other cases cited, 2 *Powell on Devises*, p. 121. In *White v. Vitty* (i), where the Lord Chancellor was assisted by the Chief Justices of the Courts of King's Bench and Common Pleas, *Tindal C.J.* in delivering his opinion, reviewed several of the authorities, and said that the effect of the surrender in those cases was, to shew *the intention* of the testator that the copyhold should pass. Then if before the stat. 55 G. 3. c. 192., in the case of a general devise of all the testator's real estate, a surrender to the use of his will was necessary to shew his intention to pass his copyholds, the

1833.

 DOR. dem.
 SMITH
 against
 BIRD.
(a) *Cro. Car.* 292.(c) 1 *Ves. sen.* 273.(e) 18 *Ves.* 193.(h) 1 *Ves. sen.* 227.(b) 5 *Ves.* 540.(d) 2 *Ves. & B.* 337.(g) 2 *Atk.* 85.(i) 2 *Russ.* 484.

testatrix

1833.

Doe dem.
SMITH
against
DAN.

testatrix who in this case made such a general devise without having so surrendered, must be taken to have intended that her copyholds should not pass. The stat. 55 G. 3. c. 192. renders valid every *disposition* made by will of copyhold tenements, notwithstanding the want of a surrender. Here the will, from the want of a surrender, was not, at the time when it was made, a disposition of the copyholds. That statute was intended to supply surrenders which were matters of form merely; and accordingly, in *Doe v. Bartle* (a) it was held that it did not dispense with a surrender, required by custom to enable a feme covert to devise copyhold lands, in making which surrender she was examined by the steward, apart from her husband; this surrender being a matter of *substance*, and intended to protect the acts of a married woman. Here the surrender is a matter of substance, because it is necessary to shew the intent of the testatrix to pass her copyholds. If her intent, when she made her will, was, that the copyholds should not pass, that intent cannot be altered by a statute passed long after. If it could, the statute would not only cure defects, but make the will. In 2 *Powell on Devises*, p. 137., it is said, "the writer is not aware that it has ever been expressly decided that the rule in *Rose v. Bartlett* (b), excluding leaseholds where the devisor has freeholds, applies where he has freeholds at the time of the will, but not at his death; so that, *in event*, the devise has nothing but leaseholds to operate upon. But there can be no difficulty, it is conceived, even in the absence of decision, in confidently asserting that the rule extends to such a case; inasmuch

(a) 5 B. & A. 492.

(b) Cro. Car. 292.

as it is the intention of the testator at the period of *making the will*, which is the point to be ascertained, and which cannot of course be evinced by subsequent events." This case is different from *Doe v. Ludlam* (a), because there the will was made *after* the 55 G. 3. c. 192. had passed; and the language attributed to the Chief Justice of the Common Pleas is referable to a will made when a surrender was unnecessary.

1833.

DOE dem.
SMITH
against
BIRD.

Preston in reply. It is unnecessary for the Court to decide whether a feme covert can by deed appoint an attorney to suffer a recovery, because here *Mrs. Warren*, when the recoveries were suffered, had an estate tail in possession; her husband, therefore, had an estate of freehold in her right, and might (during the joint lives of himself and wife) transfer a sufficient freehold to his grantee to make him tenant to the præcipe or plaint: *Robinson v. Comyns* (b), as reported in an opinion of Mr. *Booth*, in 5 *Cruise's Digest*, 312. Here, the power of attorney, as the deed of the husband, was valid, and made the appointee competent to surrender the copyhold into the hands of the lord.

Then as to the effect of the devise on the copyholds first mentioned in the declaration. A copyhold tenant might, before the late statute, acquire the power to devise copyholds by making a previous surrender to the uses of his will. The law would not, from a general devise of the real estate, infer an intent to give copyholds which the deviser had not qualified himself to devise by a previous surrender; but, where there was a previous surrender, the law would infer from such general devise that the testator intended to give all which

(a) 7 *Bing.* 275.(b) *Cas. temp. Talbot*, 164. 167. note (b), 3d ed.

1833.

Doz dem.
Smith
against
Brad.

he had a right to give. Now here Mrs. *Warren*, by the recovery and surrender to such uses as she should appoint, had acquired the potentiality of passing, by her will, all the copyholds which were in settlement. It is said that they will not pass because the will does not refer to the power; but why did she acquire the power to make a will but for the purpose of exercising it? She reserved to herself a special right of disposition and a fee also; she has done what was necessary to give her the potentiality of disposing. This is not, strictly speaking, a power, but a right of disposition. To another objection made, the answer is, that the right of disposition is reserved to Mrs. *Warren*, not *during*, but *notwithstanding*, her coverture. The object evidently was, that she should have a power of disposition which she would not otherwise have, but not that she should have that only. Then as to the copyholds not surrendered to the use of her will, the want of a surrender is supplied by the statute, which is not confined to wills made after the statute. It enacts, that every disposition *made* or to be made by any last will, by any person who shall die after the passing of that act, of copyhold tenements, shall be as valid and effectual, although no surrender shall have been made to the use of the will, as if a surrender had been made. The words "any person who shall die," &c., would be idle unless the act referred to wills already made. This is a case within the words of the statute. If a testator, before the statute, devised all his real and personal estate, and his copyholds expressly, without having surrendered the latter to the use of his will, they would not pass. The object of the statute was to supply that defect.

Cur. adv. vult.

DENMAN C. J. in the course of this term delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—

Upon this state of facts, three questions were raised in argument. First, whether the recovery suffered in 1781 was valid.

Secondly, whether *Mrs. Warren's* will was a valid execution of the power contained in the surrenders made in the years 1781 and 1782. And,

Thirdly, whether *Mrs. Warren's* will was sufficient to pass the lands to which she was admitted in 1790, having been made before the passing of the 55 G. 3. c. 192, although she died subsequently to that act.

With respect to the first question, it was objected that the recovery was void because a married woman could not, previous to the 47 G. 3. *stat.* 2. c. 8., appear and suffer a recovery by attorney, and because there was not a good tenant to the *præcipe*, inasmuch as the power of attorney to *James Guy* was void as regarded *Mrs. Warren*, who was then a married woman, and inasmuch as her husband could not appoint an attorney for her for the purpose of making a surrender.

It was answered, that a recovery suffered by a married woman, by attorney, is at all events not void, but voidable only by petition to the lord; and that the *stat.* 10 & 11 W. 3. c. 14. limits reversal of recoveries to twenty years, which have long elapsed, and that there was a good tenant to the *præcipe*, because, admitting that the power of attorney was void as the act of *Mrs. Warren*, and that her husband could not appoint an attorney for her for the purpose of surrender, as is expressly laid down in *Watkins on Copyholds*, vol. i. p. 65., yet that the power of attorney was valid as the act of

1833.

Doc. dem.
Suffer
against
Eas.

Dr.

1833.

Dox dem.
Surren
against
Brid.

Dr. *Warren*, and that the husband has such an interest in his wife's copyhold lands, as that he may pass them by surrender during the joint lives of himself and his wife, though such a surrender will not operate as a discontinuance of his wife's estate.

We are of opinion, that this is the true answer to the objection; that the act of the husband was sufficient to make a good tenant to the præcipe; and that the recovery, not having been reversed within twenty years, is good.

With respect to the second question, it was objected that the will was not a good execution of the power contained in the surrenders of 1781 and 1782, for two reasons: first, because it does not refer to the power, nor the subject of it; and, secondly, because the power extends only to the period of Mrs. *Warren's* coverture, whereas the will was made after she became a widow.

It is true, that the will is in general terms, and does not refer either to the power or the subject of it; it is also true, that there is other property upon which it would operate; but, in regard to copyholds, such a clause in a surrender is not strictly a power, but a mode of rendering the lands devisable. And it is not essential that the will should refer to the surrender: *Manwood's* case (a). Then as to the time of the execution, we are of opinion that the power is not restricted to the time of Mrs. *Warren's* coverture: the words are not "*during* her coverture," or *whilst* she shall be covert, but "*notwithstanding* her coverture, and as if she were sole and unmarried;" they were plainly intended to enable her to make a will whilst married as if she were sole, but not to disable her if she should actually become sole.

(a) *Cary's Reports*, 25. ed. 1650.

With respect to the third question there is more difficulty. In the case of *Doe dem. Clarke v. Ludlam* (a), it was held that copyholds would pass under general words in a will made since the stat. 55 G. 3. c. 192., although there had been no surrender; but it does not follow that they will pass under such words in a will made previously to the statute. We have not found any authority upon the point; but looking to the state of the law previous to the statute, and to the words of the statute, we are of opinion, that this will is not a disposition or devise of the copyhold lands to which Mrs. Warren was admitted in 1790; and, therefore, that the statute does not cure the want of a surrender. The words of the statute are, "that in all cases where, by the custom of any manor in *England* or *Ireland*, any copyhold tenant of such manor may by his or her last will and testament dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made or to be made by any such last will and testament, by any person who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual, to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will." If the will had contained an express devise of copyholds, no doubt this statute would have applied to the present case, for the words are "made or to be

1833.

Doe dem.
SMITH
against
BLAND.

(a) 7 Bing. 275.

1833.

DOE dem.
SMITH
against
BIRD.

made ;" or if there had been an implied devise of copyholds, the same consequence would have followed. But if there be neither one nor the other, and if the legal effect of the words of the will be to raise the presumption that the testatrix, at the time of making the will, intended the copyholds not to pass, the statute cannot alter that presumption, and supply a different intent. Now it has been established, by a long series of cases prior to the statute, that general words in a will are not to be applied to copyholds which have not been surrendered to the use of the will, if there be freehold lands on which they can operate, because the absence of a surrender shews that the testator intended that they should not be so applied. It follows that, when this will was made, it was not a disposition by will of the copyholds not surrendered; and neither the statute, nor any thing that has happened since, can alter the fact and make it such a disposition. The case of *Doe v. Ludlam* (a) rests on a totally different ground, for there the will was made since the statute; and it seems clear that the statute, by rendering a surrender unnecessary, has done away with the presumption of the testator's intention arising from the absence of a surrender.

Upon the whole, therefore, we are of opinion that the lessor of the plaintiff is entitled as to all the lands except those to which Mrs. *Warren* was admitted in 1790, and that, as to those, the defendant is entitled.

Judgment accordingly.

(a) 7 Bing. 275.

1833.

HARE *against* HORTON.Monday,
Nov. 18th.

CASE. The declaration stated that before and at the time, &c., divers, to wit, ten iron-founderies, machinery, apparatus and furniture, ten messuages or dwelling-houses, ten warehouses, ten shops, ten yards, and ten gardens, with the appurtenances, situate, &c., and divers, to wit, twenty cranes, twenty boilers, twenty furnaces, twenty steam-engines, &c., (describing many other articles of machinery), twenty desks, twenty tables, &c., (describing other furniture, and tools), were in the possession and occupation of *William Bailey*, as tenant thereof to the plaintiff, the reversion thereof belonging to plaintiff: and that defendant, contriving and intending to injure plaintiff in his reversionary estate in the said founderies, machinery, &c., with the cranes, boilers, &c., whilst the same were in the possession of *W. B.* as tenant to plaintiff, and whilst plaintiff was so interested

A., by a deed of mortgage, granted, bargained, sold, released, and confirmed to *B.* (in his possession then being by a previous bargain and sale) an iron-foundery and two dwelling-houses, &c. and the appurtenances; together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses; and all trees, houses, cottages, commons, &c. easements, profits, &c. to the said foundery, messuages, and

lands appertaining. There were cranes, presses, a steam-engine, and other fixtures in the foundery, used for the purposes of the business carried on there, and valued at 600*l.*: Held, that the specification of the grates and other fixtures in and about the dwelling-houses, shewed that those in the foundery were not intended to pass, though they would have passed if the others had not been mentioned.

Declaration stated, that an iron-foundery, messuages, and cranes, boilers, and other machinery, &c., which were described, were in the possession of plaintiff's tenant, the reversion belonging to plaintiff; and that defendant, contriving to injure plaintiff in his reversionary interest, while he was such reversioner, broke and entered the said founderies, machinery, &c. and messuages, with the appurtenances, cranes, boilers, &c. tore up, broke down and prostrated the same; seized, carried away, and converted the machinery, &c. and the cranes, boilers, &c. affixed to plaintiff's reversionary interest, and scattered and spread the same with rubbish, greatly injuring the said reversionary estate. Plea, not guilty. At the trial it appeared that the plaintiff had no right to the fixtures: Held, nevertheless, that enough appeared on this declaration to support a verdict for the plaintiff for unnecessary damage done in removing the fixtures, of which proof had been given.

Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage: Held, that the possession of it by plaintiff was *prima facie* evidence that it had been delivered to him as a deed.

1833.

HARE
against
HORTON.

in the same as aforesaid, viz., on, &c., wrongfully and unjustly, without the leave, and against the will of plaintiff, “ broke and entered the said iron-founderies, machinery, apparatus, and furniture, messuages or dwelling-houses, warehouses, &c., with the appurtenances, cranes, boilers, and furnaces, and other goods and chattels before mentioned, and tore up, broke down, pulled to pieces, prostrated, and destroyed the same, and seized, took, and carried away, and afterwards, on, &c., converted to his own use, the said machinery, apparatus and furniture, boilers, cranes, and furnaces, and other goods and chattels before mentioned, and things which were affixed to the reversionary estate and interest of the said plaintiff in the said iron-founderies, machinery, apparatus, furniture, messuages or dwelling-houses, warehouses, &c., with the appurtenances, cranes, boilers, &c., and other goods and chattels before mentioned, and scattered and spread the same over with large quantities of bricks, stones, mortar, and rubbish, and continued the same so scattered and spread, greatly injuring the said reversionary estate of the said plaintiff therein, from thence hitherto.” By means whereof plaintiff was greatly injured in his said reversionary estate of and in the said iron-founderies, machinery, &c. There was also a count in trover for like goods and chattels to those above mentioned. Plea, not guilty.

At the trial before *Parke J.*, at the *Stafford Spring* assizes, 1833, the following facts appeared. In *December* 1830, *Bailey* entered into an agreement with the defendant to buy of him the fee-simple of an iron-foundry, lands, and dwelling-houses, at *Great Bridge* in *Staffordshire*, for 4500*l.*; and at the same time the parties signed

an

an agreement, not under seal, for the purchase by *Bailey* of the defendant's goodwill in his business of a gasometer-maker at 200^l., and also of his stock and implements of trade, tools and fixtures, in the warehouses, shops, &c., occupied by him at *Great Bridge* aforesaid, at a valuation to be taken as in the agreement was mentioned, the amount to be paid by instalments at stated periods, and the payment to be secured by certain promissory notes: and it was further agreed, that the defendant should have the use of a house and garden, &c., part of the premises, till *Christmas*, 1831, and should be at liberty to finish certain works, then in the course of manufacture, upon the said premises. For the purpose of raising a part of the purchase-money, *Bailey* and the defendant executed a mortgage deed to the plaintiff, which was in substance as follows:—

By indenture, bearing date the 22d of *February* 1831, between the defendant of the first part, *William Spurrier* of the second part, the said *William Bailey* of the third part, and the plaintiff of the fourth part, reciting certain indentures of lease and release of the 7th and 8th of *December* 1825, whereby all that iron-foundery, together with the two dwelling-houses, warehouses, shops, yards, garden, and appurtenances thereto belonging, situate at or near *Great Bridge*, &c., formerly in the occupation, &c., and also all that close, called the *Foundery Field*, situate near *Great Bridge* aforesaid, adjoining, &c., then in the occupation, &c., together with their rights, members, and appurtenances, were conveyed, limited and assured to such uses as the defendant should appoint, and in default of appointment, to the use of him and his assigns during his life, with a limitation to the use of *Spurrier*, his executors, &c., during the life of the defendant, remainder to the use of the defendant in fee;

1833.

HARE
against
HORTON.

1893.

HARE
against
HOBSON.

reciting also, that the defendant had contracted with *Bailey* to sell him the fee-simple of the foundery, messuages, lands, and other hereditaments intended to be by that deed appointed and released, for 4500*l.*; reciting also, that *Bailey* had requested the plaintiff to lend him 3500*l.* to enable him to complete the purchase, and the plaintiff had agreed to do so on having the said sum and interest thereon secured by mortgage on the said foundery, messuages, lands, and other hereditaments, as after mentioned: it was witnessed, that, in pursuance of the agreement on the part of the defendant, and in consideration of 1000*l.*, part of the purchase-money, paid to him by *Bailey*, and 3500*l.*, the residue, paid to him by the plaintiff, and by virtue of the above-mentioned power of appointment, the defendant appointed that the foundery, messuages, lands, and other hereditaments after mentioned, &c., with their appurtenances, should go and remain to the use of the plaintiff in fee, upon the trusts, &c. after mentioned. And *Spurrier*, in consideration, &c., and at the request and by the direction of the defendant and *Bailey*, did bargain and sell, and the defendant, at the request, &c. of *Bailey*, did grant, bargain, sell, alien, release, and confirm to the plaintiff (*in his possession then being by a previous bargain and sale*) and his heirs, all and singular the said iron-foundery, together with the said dwelling-houses, warehouses, shops, yards, gardens, and appurtenances thereunto belonging, and therein-before more particularly described, and then in the occupation, &c.; and also all that close called the *Foundery Field* before described, and the dwelling-houses or buildings erected thereon, and all other the hereditaments conveyed in and by the before-recited indentures of lease and release, (with the exception therein made of certain mines, minerals, &c.);

“ together

"together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses and the brewhouses thereto belonging; and all fruit and other trees growing upon the said premises; and all houses, cottages, out-houses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow and pasture feedings, woods, underwoods, and the ground and soil thereof, commons, &c., and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, water-courses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever to the said foundery, messuages, lands, and other hereditaments hereby released or otherwise assured, or intended so to be, or any of them respectively, belonging or in anywise appertaining, or accepted, reputed, held, &c., as part, parcel, or member of the same or any of them respectively; and the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said foundery, messuages, lands, and other hereditaments hereby released, &c., and every part and parcel of the same, with their and every of their rights, members, and appurtenances; and all the estate, right, title, interest, &c., of the said *William Spurrier* and *Joshua Horton* (the defendant), and each of them, of into and out of the said foundery, messuages, lands, and other hereditaments, and every part and parcel of the same, with their rights, &c.:" habendum to the plaintiff in fee, upon and for the trusts, intents, and purposes, and with, and subject to the powers, provisoes, agreements, and declarations thereafter expressed concerning the same. The deed also contained a proviso for reconveyance by the plaintiff to *Bailey*, his heirs, &c., on repayment of the 3500*l.* and interest; a power to the mortgagee to sell on default in

1833.

HARE
against
HORTON.

1833.

 HARR
 against
 HORTON.

payment of the principal or interest; and a proviso, that *Bailey* should hold and receive the rents, issues, and profits of the hereditaments by that indenture appointed and released, without let, &c. by the plaintiff, until such default should be made.

The above deed was executed by the defendant and *Spurrier*, (neither the plaintiff nor any person on his behalf being present,) and witnessed by Mr. *Fellows*, the defendant's attorney, and Mr. *Caldecott*, his mining agent. The deed was then delivered to *Caldecott*, but there was no evidence of his having delivered it to the plaintiff, except that the plaintiff produced it at the trial.

Bailey was let into possession, and, at the time next mentioned, was in the exclusive occupation of the premises, machinery, and other property, except the house and garden mentioned in the agreement of *December* 1830. In *June* 1831, a dispute having arisen between *Bailey* and the defendant as to the fulfilment of that contract, the defendant, with a number of men, entered the foundery, carried away the tools and other moveables, and severed and took away, among other things, a steam-engine, cranes, presses, frames for gasometers, and other apparatus, all fixed into the earth or walls, doing thereby much unnecessary damage to the premises. For the injuries caused by this proceeding to the plaintiff's reversionary interest, the present action was brought. The value of the fixtures and tools was stated at the trial to be 1545*l.* The plaintiff was nonsuited, but leave given to move to enter a verdict for 600*l.*, the value of the fixtures, or 35*l.*, the amount of damage done to the freehold in removing them. The points reserved were: First, Whether the fixtures annexed to the foundery passed to the plaintiff by the mortgage

mortgage of *February* 1831? Secondly, Whether on the present declaration, the plaintiff could recover for the alleged injury to the freehold? Thirdly, Whether the instrument of mortgage was delivered as a deed, or only as an escrow? A rule nisi having been obtained,

1833.

HARE
against
HORTON.

Maule and *R. V. Richards* now shewed cause. As to the first question, *Ex parte Quincy* (a), as far as it is an authority on the point, tends to shew that the fixtures would not pass by the mortgage-deed. The language there used is indeed loose, and no satisfactory reason is assigned. But in the present case, the words of the deed clearly shew the intention not to pass the fixtures belonging to the foundry. The grant is, "of the said iron-foundry, together with the said dwelling-houses, warehouses," &c.; after which nothing is said of the fixtures belonging to the foundry, but the deed goes on; "together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses, and the brewhouses thereto belonging." [*Patteson* J. If there are three houses mentioned, and a grant of fixtures refers only to those in two, can it be said that those in the third will pass?] The maxim, "expressio unius est exclusio alterius," would apply. But the case here is even stronger, for the general mention of fixtures is preceded by that of "grates, boilers, and bells;" and the rule is, that where an enumeration begins with the mention of particular things, subsequent general words only carry things ejusdem generis. If, therefore, the enumeration in this case had been applicable to the foundry as well as the dwelling-houses, still the grant would not have passed

(a) 1 Atk. 477.

1833.

HANE
against
HORTON.

fixtures of a more important kind than those first named. The court, in construing an instrument like this, may look to the intention of the parties, as was done in *Colegrave v. Dias Santos (a)*, and if matter dehors the deed be admissible to explain that intention (which was left undetermined in *Thresher v. The London Water-works Company (b)*), the agreement of December 1830 goes far to shew that the fixtures in question were not meant to pass to the plaintiff by this mortgage. As to the second point; if these fixtures did not so pass by the deed, there is no proof of any injury sustained by the plaintiff, to which the declaration is applicable. Thirdly, the instrument of mortgage was delivered by the defendant to *Caldecott* merely as an escrow, to be the defendant's deed on the performance of the previous agreement by *Bailey*, and any misconduct of *Caldecott* in parting with it before the proper time could not alter its nature. It is indeed laid down in *Com. Dig. Fait*, (A. 3.), that if one deliver a writing, as his deed, to a stranger, to be delivered to the party upon performance of a condition, it shall be his deed presently, and if the party obtains it, he may sue before the condition performed, and *Degory v. Roe (c)* is cited. But it is pointed out in *Johnson v. Baker (d)*, that that dictum in *Comyn* rests upon an erroneous report of the case referred to, which was, in fact, decided the contrary way.

Talfourd Serjt., Cripps, and Hoggins contra. The fixtures in the foundery passed by the mortgage deed. *Accessorium sequitur suum principale, Shepp. Touchst.*

(a) 2 B. & C. 76.

(b) 2 B. & C. 608.

(c) 1 Leon. 152.; but see *Moore*, 300. S. C. See, also, 13 Vin. Abr. *Faits*, (M.)

(d) 4 B. & A. 442.

89. (a), and it is there laid down that, "by the grant of mills, the waters, floodgates, and the like, that are of necessary use to the mills, do pass;" and the editor adds, "also a stone belonging to the mill, though separated from the mill to be new worked." In the present case, many of the articles were necessary for the purposes of the iron-foundry, or for carrying on the business of a gasometer-maker. [*Patteson J.* In *Place v. Fagg* (b), it was held, that by mortgage of a mill the mill-stones and tackling passed. There will hardly be any dispute on this point; the question will be, whether the effect of the deed as to these fixtures is not limited by the subsequent parts.] The express mention of the fixtures in and about the dwelling-houses will not prevent the fixtures at the foundry from passing by the general words "the said iron-foundry."—"If a man has a house in *A.*, and houses and lands in *B.*, and devises his house in *A.* to one, and (having demised the houses and lands to *D.* rendering rent) all those his lands, meadow, and pasture in *B.* to another, his houses there pass by the word lands, though he mentions his house in *A.* expressly;" *Com. Dig. Grant*, E. 3. citing 2 *Roll.* 57. l. 20. Where the land is granted, every thing which is inseparable from the soil must pass. If houses would pass, the same reason would extend to the cranes in this case, which are fixed deeply in the ground. And deeds are to be construed most strictly against the grantor. This is an acknowledged principle of law, and the rule for construing maxims and applying them in practice, is to see if they go in accordance with and extend an ac-

1833.

HARRIS
against
HORTON.

(a) 7th edit. by Mr. Preston.

(b) 4 *Man. & Ry.* 277.

knownedged

1893.

HARR
against
HORTON.

knowledge principle; but to give the effect contended for to the maxim *expressio unius, &c.* (which is rather a maxim of reason than of law), would be to contract the operation of the principle just referred to. If the things expressed had been such as would not necessarily pass by the deed, as benches, weights and scales, or water-tubs, the naming of these would have excluded other things of the same description not named. But the fixtures in question did not require to be named or referred to in this deed, and the mention of them should not prejudice the plaintiff, for *utile per inutile non vitiatur*. Any mention of them was nugatory: "*expressio eorum quæ tacitè insunt, nihil operatur.*" If the fixtures mentioned be understood as those of the dwelling-houses and brewhouses only, it may be that those particular fixtures were mentioned from an apprehension that they might otherwise have been understood to be removeable as tenant's fixtures, upon the grounds stated in *Grymes v. Boweren* (a), though no such question could arise as to those in the foundry. As to these last, *Ex parte Quincy* (b) is no decision in favour of the defendant, for it does not appear that that case was finally decided; and if the language there used raises any doubt, *Colegrave v. Dias Santos* (c) shews clearly that fixtures will pass by a conveyance of the freehold, if there be no contrary intention expressed: *Thresher v. The East London Water-works Company* (d), supports the same proposition; and these cases shew *Ex parte Quincy* to be no authority, for the purpose for which it is cited. It might further be contended, if necessary, that the machinery and engines let into the

(a) 6 Bing. 437.

(b) 1 Atk. 477.

(c) 2 B. & C. 76.

(d) 2 B. & C. 608.

ground

ground passed under the description of "edifices and buildings," "to the said foundery, messuages, lands, &c. belonging;" *Naylor v. Collinge* (a). That was a case of annexations made to the freehold by a tenant for the purposes of trade; yet it was held that the right to remove was controlled (as to the buildings let into the soil) by the covenant to yield up all buildings in good repair: and the Court said that if there had been an intention to exclude any thing, it should have been expressed. Here, even supposing that the machinery might have been removed before the vendor gave up possession, still, after the plaintiff had had possession, the right was gone: *Colegrave v. Dias Santos* (b), and *Lee v. Risdon* (c) there cited. The defendant is estopped from denying that the plaintiff had received possession by his own mortgage deed, where he releases to the plaintiff the premises "in his possession then being," &c. In *Steward v. Lombe* (d), land had been mortgaged, together with a windmill which was upon it, fastened to the soil, but capable of being removed; the mortgagor remained in possession; but it was nevertheless held, that the conveyance to the mortgagee prevented a creditor of the mortgagor from taking the mill under a *fi. fa.* The present deed clearly expresses the intention of the defendant and *Spurrier* to pass to the plaintiff every right and interest which they had in these premises. The only exception from the grant is of the mines and minerals reserved by the indentures of 1825: no exception is made of fixtures.

Secondly, the declaration is in an ordinary form, and it was not necessary to prove all the allegations. It alleges that the defendant broke and entered the iron-

1839.

HARE
against
HORTON.

(a) 1 Taunt. 19.

(b) 2 B. & C. 76.

(c) 7 Taunt. 188.

(d) 1 B. & B. 506.

founderies,

1833.

HANE
vs. H.
Horton.

founderies, machinery, messuages, dwelling-houses, &c., and tore up, broke down, prostrated, and destroyed *the same*. That includes the buildings as well as machinery; the declaration, therefore, does state an injury to the substance of the freehold. If the defendant had a right to take the fixtures, he is liable for injuring the premises. It was an excess, which might have been new assigned in an action of trespass, if the plaintiff had been in a situation to bring one: it was also proveable under the general issue.

As to the other point, the deed is found in the possession of the plaintiff. The production of it by him was sufficient, *primâ facie*, to shew that it was delivered to him as a deed. It did not lie upon the plaintiff to prove that *Bailey* had performed his part of the agreement between him and the defendant.

PARKE J. (a) I am of opinion, and the rest of the Court agree with me, that this rule must be made absolute to a certain extent. The first question is, whether the fixtures at the foundery passed to the plaintiff by the mortgage-deed. Looking at all parts of the deed, and especially at the manner in which the conveyance is qualified as to fixtures by the reference to the dwelling-houses, I am of opinion that the fixtures in question did not pass. *Primâ facie*, the mere conveyance of the foundery would have passed them; but we must look to the deed to see how far that is controlled by subsequent words; and I think no reasonable person can doubt, that if a transfer of those fixtures had been contemplated, different expressions would have been used. The granting part of the deed (to which the appointing

(a) *Denman* C. J. was attending the Privy-Council.

part refers) is as follows. (His Lordship then read the description of the premises and other matters conveyed, as it is set out, *antè*, pp. 718, 719.) Now, I think it is impossible to suppose, that if the parties making this grant had intended to convey by it fixtures which are valued at more than 600*l.*, they would have omitted to mention those, and inserted others which are of much less importance. It seems to me, therefore, that the intention was to pass the walls of the foundry, and nothing more; and consequently the plaintiff must fail as to that part of the case. Then is he entitled to recover 35*l.* for the alleged injury to the reversion? When I first looked into the declaration, I thought it did not meet the case in this respect: it is only upon examining it more narrowly that I find enough stated to entitle the plaintiff to recover. The real complaint is, the entry of the defendant to take away, and his taking away, these fixtures. But the first count contains a number of allegations, which may be read disjunctively. It states that the defendant entered into ten iron-foundries, machinery, apparatus, and furniture, ten messuages, &c., and twenty cranes, &c., in the possession of *Bailey* as tenant to the plaintiff. There is nothing which obliges the plaintiff to shew that *Bailey* was his tenant both of the walls and the fixtures; the count may therefore be read as if it merely stated that the foundries and messuages were in *Bailey's* possession as tenant. It then goes on to state that the defendant, contriving to injure the plaintiff in his reversionary estate and interest in the said iron-foundries, machinery, apparatus, and furniture, messuages, &c., with the cranes, &c. before mentioned, tore up, broke down, pulled to pieces, and destroyed

1833.

HARRIS
against
HORTON.

1833.

HARR
against
HORTON.

stroyed the same, and scattered and spread the same with rubbish, greatly injuring the plaintiff's reversionary interest therein. The allegations may be taken distributively, and we may read a portion of the count as if it contained merely the simple statement that the plaintiff was entitled to a reversionary interest in the foundry, and the defendant wrongfully entered into it and pulled down a part. That was all which the plaintiff was under the necessity of proving. The defendant's case is, that he entered in exercise of a right; but if that had been specially pleaded, the excess might have been new assigned, and the jury here have, in effect, found such excess. Stripping the statement of unnecessary allegations, it amounts to a complaint that the defendant, in removing the fixtures, did a damage to the premises, which need not have occurred if the removal had been carefully made. The plaintiff is therefore entitled to a verdict for 35*L.*, unless the instrument of mortgage was improperly admitted as a deed. I said at the trial, that although there was evidence that the deed was at first delivered as an escrow, yet its being afterwards found in the plaintiff's possession was some evidence that the condition upon which it was so delivered had been complied with; and the defendant should, if it had been in his power, have shewn the contrary. I still remain of that opinion.

TAUNTON J. On the first point I confess I have not been able to entertain much doubt. It is very plain, that if the granting part of the deed had only mentioned the foundry, messuages, and dwelling-houses, the foundry fixtures, as well as those in the dwelling-

houses,

houses, would have passed: there are many cases which shew this. But as the deed goes on to say "together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses," I think the mention of these fixtures excludes those in the foundery, on the principle, "*expressio unius est exclusio alterius*." Why, it may be asked, were these particular ones mentioned if the whole were intended to pass? Besides, the mention of bells and other fixtures of an inferior kind, shews that fixtures of greater value and on a larger scale were not contemplated. And in the recital of the plaintiff's agreement to lend money, in the early part of the deed, it does not appear that any security was proposed beyond that of the real property. As to the second point, the declaration is nearly silent on that which is the real gist of the action; namely, the taking away of the fixtures without due care to avoid damaging the premises. Almost the whole of the first count is pointed to acts of force, not negligence, and seems to have been framed on the speculation that the taking of the fixtures could be made the cause of action. There are, however, some words in that count which cannot be rejected, and which amount to an allegation, divisible from the rest, of a cause of action upon which the plaintiff is entitled to recover. It is stated that the defendant broke and entered the iron-founderies, machinery, and apparatus, and tore up, broke down, pulled to pieces, prostrated, and destroyed *the same*; that is, all these, or some or one of these things, which includes, among the rest, the walls of the foundery: and that so the plaintiff was damaged in his reversionary interest to an amount covering the sum found by the jury.

We cannot say, therefore, that the declaration is wholly beside the cause of action. As to the third point, the

1833.

HARR
against
HARRISON.

1883.

HARR
against
Horton.

fact of the deed being in the plaintiff's possession was *prima facie* evidence of its having been delivered to him as a deed.

PATTESON J. I have had considerable doubt on this case, but am now satisfied that the mortgage deed did not carry the fixtures. I should be sorry to bring into question the decision of this Court, that a conveyance of premises will pass all that is attached to them: and at first I thought that the language of the appointment in this deed was large enough to carry the fixtures in question; but that clause refers to the granting part; and we there find that the defendant and *Spurrier* grant and confirm the iron-foundry, &c. together with all grates, bells, boilers, and other fixtures in and about the two dwelling-houses; and, therefore, the rule applies "*expressio unius est exclusio alterius*." As to the declaration, I am now of opinion, though I at first thought otherwise, that it is sufficient to include the present cause of action. The first count is for an injury to the plaintiff's reversionary interest in houses, foundry, and fixtures. The plea of not guilty, if put into other words, alleges that the plaintiff had no reversionary interest in the fixtures; and, as to the supposed injury to the building, that the defendant acted in exercise of his right, doing no unnecessary damage. The plaintiff, by joining issue, denies the assertion that the defendant did no unnecessary damage. On the third point, a sufficient answer has been given.

Rule absolute to enter a verdict for the plaintiff for 35*l.* on so much of the first count as relates to the injury to the reversion. The verdict to be for the defendant on the rest of the first count, and on the second.

1833.

DOE dem. PILKINGTON *against* WILLIAM SPRATT.

EJECTMENT to recover possession of a messuage and lands being copyhold of the manor of *East and West Deeping* in the county of *Lincoln*. At the trial before *Denman C. J.* at the *Spring assizes* for the county of *Lincoln*, 1833, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case: —

William Spratt, by his will dated the 10th of *March* 1801, devised as follows: — “ I give and devise all that my cottage and lands, being formerly two tenements, called the *Customs*, together held by copies of court roll of the manor of *East and West Deeping*, under the yearly rent of 9s. and 6d., with the appurtenances thereunto belonging, unto my son *Daniel Spratt* and *Sarah* his wife, and *James Hankin* and *Elizabeth* his wife, or the survivor of them, during their natural lives and no longer; and after the decease of all of them to the male heir at law of me the said *William Spratt*, his heirs and assigns for ever. I give and bequeath unto my sons *Charles*, *Urias*, and *James*, seven shillings each, to be paid within one month after my decease. And I do hereby nominate and appoint my sons *Daniel Spratt* and *James Hankin* joint executors of this my will.”

According to the custom of the manor, copyholds may be granted in tail. The premises mentioned in the above devise were those for the recovery of which this action was brought. The testator died on the 10th of *October* 1801, leaving five sons and one daughter; *William* (the

A. devised copyhold lands to his son *D.*
S. and his wife, and *J. H.* and his wife, or the survivor of them, for their lives; and after the decease of all of them, to the male heir at law of him the testator, his heirs and assigns for ever; he then bequeathed legacies to three other sons, and afterwards died, leaving five sons and one daughter, three by his first wife, and three by the second: Held, that the fee vested, at the testator's death, in the person who was then his male heir at law, and did not remain contingent until the determination of the life estates.

1833.

—
 Dox dem.
 PILKINGTON
 against
 SPRATT.

eldest), *Charles*, and *Elizabeth*, by his first wife; *Daniel*, the eldest child by the second marriage, *Urias*, and *James*, by his second wife. On the 28th of *April* 1802, *Daniel Spratt*, and *Sarah* his wife, and *Elizabeth Hankin*, widow of the above mentioned *James Hankin*, the survivors of the devisees for life mentioned in the devise above set out, were duly admitted to the said premises to hold to them and the survivors of them during their natural lives. On the 1st of *October*, *William Spratt*, eldest son and heir at law of the testator, was admitted to the reversion of the said premises, expectant on the death of *Daniel Spratt* and *Sarah* his wife, the then surviving devisees for life. On the 20th *November* 1806, the said *William Spratt* and the devisees for life surrendered absolutely to the use of *Benjamin Handley* certain common rights in *East* and *West Deeping*, which were appurtenant to the said devised premises; and the said *Benjamin Handley* was admitted to such common rights upon that surrender; and upon an inclosure which afterwards took place, allotments were made to him in respect thereof, of which he is still possessed. *William Spratt*, the son, died without issue and intestate in 1811; and on the 17th *January*, 1821, *Charles Spratt*, brother and heir at law of the said *William Spratt*, was admitted to the reversion of the premises in question, expectant on the death of the tenants for life. On the 14th of *November* 1821, *Charles Spratt* joined the tenants for life in a conditional surrender of the premises in open court to the lessor of the plaintiff, his heirs and assigns, with a proviso for redemption by *Charles Spratt*, or the tenants for life, or either of them, their heirs, executors, or administrators; and the lessor of the plaintiff was thereupon duly admitted

mitted according to the effect of such surrender. *Charles Spratt* died in the year 1831 in the lifetime of *Daniel Spratt*, the last surviving tenant for life, leaving *William* his eldest son. *Daniel Spratt* died in 1831, and, upon his death, the last named *W. Spratt* was admitted to all the premises devised by the will. By the custom of the manor of *East and West Deeping*, an absolute surrender operates to bar an entail. The question for the opinion of the Court was, whether the remainder over, after the death of the tenants for life mentioned in the will, vested in the son who was heir at law at the time of the testator's death, or whether it vested, upon the determination of the life estates, in that *William Spratt* who was, upon such determination, the male heir at law of the testator. In the former case the verdict was to stand, in the latter a verdict was to be entered for the defendant. This case was argued in the present term (a).

1833.

Don dem.
PILKINGTON
against
SPRATT.

N. R. Clarke for the lessor of the plaintiff. The remainder vested on the testator's death in his son *W. Spratt*, who was then his male heir at law. It did not remain contingent until the determination of the life estates. The general rule of law is not to construe a limitation in a will as a contingent remainder, if it be capable of being considered as vested; and on that principle the decision in *Doe v. Moxey* (b) proceeded. *Bayley J.* there says, "It is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have been the intention of the testator;

(a) Nov. 15th. Before *Denman C. J., Parke, Taunton, and Paterson Js.*

(b) 12 *East*, 589.

1833.

DOE dem.
PILKINGTON
against
SPRATT.

but if it will admit of being considered as a vested remainder, the Court will always read it as such ; because a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated." In *Holloway v. Holloway (a)*, a testator, by codicil, bequeathed 5000*l.* in trust for his daughter for life, and after her decease for such child or children as she should leave at her decease, in such shares as she should think proper to give the same ; and in case she should die leaving no child, then in trust for such person as should be his heir at law. And Lord *Alvanley* said, "the only question is, whether upon the true construction of this codicil it must necessarily be intended, he (the testator) did not mean by these words what the law *primâ facie* would, strictly speaking, intend, heirs at law at the time of his death. A testator certainly may by words properly adapted shew that by such words, *persona designata*, answering a given character at a given time, is intended. But *primâ facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case, the words are not necessarily confined to any particular time : nor from the nature of the gift is there any necessary inference, that it should not mean, what the law would take it to mean, heirs at the death of the testator." Those observations apply to the present case. This case is distinguishable from *Doe dem. King v. Frost (b)*, where the devise was to the testator's son *W. F.* and his heirs for ever, and if he should have no children, child, or issue, the estate was on his decease to become the pro-

(a) 5 Ves. 399.

(b) 3 B. & A. 546.

perty of the heir at law, subject to such legacies as *W. F.* might leave by will to any of the younger branches of the family. In that case it was held that *W. F.* took an estate in fee, with an executory devise over in the event of his dying without leaving issue, to such person as should be then, and in that event, heir at law of the testator. That case falls within the rule laid down by Lord *Alvanley*, because it must there have been necessarily intended that the testator meant the person who should be heir of the testator at the death of the son, for he had previously given the fee to the son, who would be heir at his, the testator's death; but here there is no such necessary intendment. The gift is to the male heir at law. The testator's eldest son was not otherwise provided for.

1833.

—
DOR dem.
PILKINGTON
against
SPRATT.

Preston contra. It is true that the law rather inclines to the vesting of estates than suffering them to remain in contingency; but still as it is competent to a testator to make a remainder either vested or contingent, his intention must be collected from the context of the will. Here it sufficiently appears from the whole will, that the testator intended the remainder to be contingent until the determination of the life estates. The gift, after the determination of those estates, is to the male heir at law of the testator, his heirs and assigns for ever. Now, the words "heir male" are always held to mean heirs of the body. The gift is not to the eldest son by name, or to the right heirs by character; if it had been so given, the heir might have taken by descent: as it is, the male heir takes by purchase, not by descent. If the testator's eldest son had died during the lifetime of his father, and left a daughter, that

3 B 4

daughter

1833.

DOE dem.
PILKINGTON
against
SPRATT.

daughter could not have taken under this will, because she would not have been heir male: *Counden v. Clerke* (a). But here, the estate to be taken by the heir male, is to him and his heirs. And when he was ascertained, the testator intended to let in the largest possible course of descent. *Doe dem. Cholmondely v. Murey* (b) was undoubtedly decided on the principle, that the law rather inclined to the vesting of estates than suffering them to remain in contingency; but *Phillips v. Deakin* (c) which comes very near the present case, is an instance where the Court collected from the context of the will, an intent to suspend the remainder until the determination of the particular estate. There the testator, after a gift of several particular estates, for default of issue, devised in these words: "to such of the uses, for such of the intents and purposes, and under and subject to such of the limitations, powers, provisoes, conditions, and agreements mentioned and declared in and by the said will of my late cousin *Thomas Vernon*, as shall be *then* existing undetermined, or capable of taking effect, or as near thereto as the deaths of parties, and other intervening accidents and contingencies, and the rules of law and equity will then admit of." The Court declared that the limitation to the party who would be entitled under the recited will, was contingent and suspended till the prior particular estates should be determined. So in *Marsh v. Marsh* (d), the testator ordered the residue of his personal estate to be laid out in the purchase of stock, and that the trustees should pay the interest, &c. to his son *W. W.* for life; and from and after his decease, to *his* eldest son and his heirs for ever;

(a) *Holt*. 59.(b) 12 *East*, 589.(c) 1 *M. & S.* 744.(d) 1 *Bro. Ch. Ca.* 293. *Mr. Bell's* edition.

and

and in case of their death without issue, unto his (the testator's) nearest relation, and to the nearest relations (heirs of such nearest relation) for ever. At the time of making the will, the testator lived separate from his wife. He had only one son, who was unmarried, (and who afterwards died in the lifetime of his father); he had a half sister, the plaintiff; and there were also alive children of a deceased half brother, who, with the testator's widow, were the defendants. And it was held by the lords commissioners, that if *W. W.* had had a son, that son would have taken the whole from his birth, but that at the decease of *W. W.* without issue, there was a good remainder over to the then nearest relation of the testator, namely, the half sister: and, according to the note from Sir *S. Romilly's MSS.*, Lord *Loughborough* said, "the testator certainly meant that the nearest relation at the time of the decease of the son should take the property, not the nearest at his own decease. To suppose he meant a reversion to his son is impossible; and his widow clearly has no title. The surviving sister is alone entitled." *Doe v. Frost* (a), already mentioned, is an authority the same way. *Cholmondely v. Clinton* (b) also is to the same effect. On the intent of the deed there, it was argued, that the ultimate limitation to the use of the right heirs of *S. R.*, was to the person who should answer that description at the determination of the prior particular estates, and not to Lord *Orford*, himself the grantor, who, at the date of his deed, was the right heir. On a case from the Court of Chancery, the majority of the Judges certified their opinion that the words *right heirs* were words of plain

1833.

DOX dem.
PILKINGTON
against
SPRATT.

(a) 3 B. & A. 546.

(b) 2 Meriv. 171. 2 B. & A. 625. 2 Jacob & W. 113.

and

1833.

DOE dec.
PILKINGTON
against
SPRATT.

and well known import; and, therefore, must denote the settlor himself, and that the ultimate limitation was void. *Bayley* J. was of opinion, and certified, that, from the context of the deed, its effect was to vest in the settlor an estate in tail, with remainder to such person as, at the expiration of that estate tail, should be right heir of *S. R.* in fee. Here it is proper to look to the state of the testator's family. There were five sons and one daughter; and three sons were of the half blood to the other two sons and daughter. Testators generally look more to the time for possession than the time of vesting. The testator, in this case, most probably meant the person who would be his heir at law at the determination of the particular estates; and the construction, that his immediate heir at the time of his death took, would exclude the brothers of the half blood, while they had a chance by suspending the time of vesting. Looking at this state of the family connection, the true construction of the will is, that the testator meant the person who would be heir male at the time of the determination of the particular estates; and, at that time, the taker was to have the largest possible estate, in point of descendible qualities.

N. R. Clarke in reply. In *Phillips v. Deakin* (a) the devise after the gift of the particular estates was, for default of such issue, to such of the uses, &c. as should be then existing undetermined, or capable of taking effect. Here there is no corresponding language to shew that the testator must have meant the remainder to vest only on the death of the tenants for life. In all the other

(a) 1 M. & S. 744.

cases cited there were grounds of decision which do not exist here. The argument from the exclusion of the half blood would apply to any case where parties would have a chance by suspending the time of the estate vesting.

1838.

DOX dem.
PILKINGTON
against
SPRATT.

Cur. adv. vult.

DENMAN C. J. in this term delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—The law favours the vesting of estates, and it is an established rule of construction, not to read a limitation in a will as being a contingent remainder, unless such clearly appears to have been the testator's intention—if it admits of being considered as a vested remainder, it will always be read as such. Consequently, where land is given to one for life, or any other estate upon which a remainder may be limited, and after the determination of that estate, to a person sustaining a given character as heir at law, heir male, or next of kin of the testator, or of another, the remainder will vest in the person or persons who fill that character at the death of the testator, unless it can be plainly and distinctly made out from the will that the testator intended otherwise. Cases in which the rule is laid down were quoted on the argument, and others were referred to, in which the clear intention of the testator to the contrary prevailed.

Upon examining the latter class of decisions, it will be found that the intent of the testator, that the person who filled the required character at his death should not take, is to be collected in the clearest way from the provisions of the will. In the present case, there are none of the circumstances relied upon in that class

1833.

DOE dem.
PILKINGTON
against
BRATT.

class of cases; there is no inconsistency in adopting the general rule; there is nothing to shew that the testator did not mean, by the words "heir male at law," what the law would, strictly speaking, intend, heir male at law at the time of his death. The words are not necessarily confined to any particular time, nor does the case furnish any certain inference that they were so limited. They merely raise a conjecture that this testator, as other ignorant persons usually do, looked to the period of the actual possession, and not the vesting of the estate in remainder, and had in his contemplation the person who would be his heir at law at that time.

In the cases relied on for the defendant, an intent contrary to the general rule was shewn. Thus in *Doe v. Frost* (a), where the devise was to *W. F.* (the testator's eldest son and heir at law) and his heirs for ever; and if he should have no children, child, or issue, the said estate, on the death of *W. F.*, to become the property of the heir at law, subject to such legacies as *W. F.* might leave by will to any of the younger branches; it was held that the executory devise over vested in the person who would be heir at law at the death of *W. F.* without issue living at his death; for it is clear that *W. F.* himself could not be meant as the heir at law, as then the devise over would be nugatory, and the power of leaving legacies unnecessary.

Again, in *Phillips v. Deakin* (b), where the devise was to the testator's daughter for life, remainder to her first and other sons in tail male, with remainder over to his niece, her sons and daughters severally and successively in tail, and for default of such issue, to such of the uses,

(a) 3 B. & A. 546

(b) 1 M. & S. 744

and

and subject to such limitations declared by the will of *Thomas Vernon*, as shall be then existing, or capable of taking effect, or as near thereto as the deaths of parties will *then* admit, it was held that *T. S. Vernon*, who would have been tenant in tail in possession under the will of *Thomas Vernon*, took no vested estate under the will in question, for the use of the word *then* clearly shewed that until failure of issue of the niece, the person to take should not be determined. In *Marsh v. Marsh* (a), where there was a bequest of the interest of stock to the testator's son for life, and from and after his decease to his eldest son and his heirs, and in case of their death without issue, to the testator's nearest relation, Lord *Loughborough* held (as appears by Mr. *Bell's* note) that the nearest relation, when the event happened, must have been intended, because it was impossible to suppose he meant his son to whom he had given the previous estate.

The last case mentioned was *Lord Cholmondely v. Clinton* (b), in which the intention to be collected from the recital and other parts of the deed itself was clear, that the limitation to the right heirs of *Samuel Rolle* was not intended to vest in the settlor himself.

The verdict therefore which has been entered for the plaintiff must stand.

Judgment for the plaintiff.

(a) 1 Bro. Ch. Ca. 293.

(b) 2 Meriv. 171. 2 B. & A. 625. 2 Jacob & W. 113.

1833.

DOX dem.
PILKINGTON
against
STRAPE.

1833.

Tuesday,
Nov. 19th.

RIPPINGHALL, Clerk, *against* LLOYD.

Vendor covenanted under seal to vendee, that he would on or before the 30th of November then next, deduce a good title to the premises sold; and would on or before the 8th of January

COVENANT. Declaration stated that on the 23d day of *October* 1827, by articles of agreement under seal, the defendant agreed with the plaintiff to sell him the fee-simple and inheritance in possession of certain freehold and leasehold property for 21,020*l.*; and that defendant would on or before the 30th day of *October* then instant, at his own expense, make and deliver to

execute a proper conveyance for conveying the fee-simple; and it was stipulated that the conveyance should be prepared by and at the expense of the vendee; and further, that if the vendor should not verify the title to the vendee or his agent, by production of deeds, &c. at *Norwich, Lynn, or London*, before the 30th of *November*, the agreement should be void.

In an action of covenant by the vendee, two breaches were assigned: first, that the vendor did not on or before the 30th of *November*, deduce a good title; secondly, that the defendant did not on or before the 8th of *January* execute a proper conveyance.

Plea first, that the vendor did before the 30th of *November* produce and shew divers deeds, in part deducing a good title, and that until and upon that day he was ready and willing to produce and shew to the vendee other deeds, completing such title, and would on or before that day have produced such deeds to the vendee or his agent attending, whereof the vendee had notice, but that he would not by himself or agent attend: Held, on special demurrer, that the plea was bad, inasmuch as the vendor's covenant was general, and therefore the facts stated were no excuse: And that if the covenant could be read as qualified by the subsequent stipulation as to place, the plea ought to have averred notice to the vendee, at which of the three places the vendor would be ready to produce his deeds.

Plea, secondly, to the first breach, that by a subsequent agreement made before any breach committed, the time for deducing title had been enlarged; and that the vendor was ready to deduce title within such enlarged time. Thirdly, the defendant pleaded a similar agreement after breach, and that plaintiff accepted such agreement as a substitution for the former, and as a satisfaction of the damages resulting from the breach; and that defendant was ready to fulfil such agreement, but plaintiff refused, &c.:

Held, on special demurrer, that the second plea was bad, in not stating the new agreement to have been under seal. Leave given to amend the third plea by stating the new agreement to have been in writing; but, quære, if it were so, whether the facts amounted to a good accord and satisfaction.

Plea to the second breach of covenant, that the vendor until and on the 8th of *January*, was ready and willing to execute proper conveyances, and would have executed the same if the plaintiff would have prepared and tendered them, but that he did not do so.

Replication, that the vendor did not deduce a good title, wherefore the vendee did not prepare the conveyances.

Rejoinder, that although the vendor within a reasonable time before the 8th of *January*, was ready and willing, and offered to deduce a good title, so that the vendee might before the 8th of *January* have prepared and tendered conveyances, whereof the vendee had notice, yet the vendee refused to have such title deduced, and discharged the defendant from deducing such title. Surrejoinder, that the vendor was not ready and willing to deduce, &c.

On general demurrer, Held, that, upon this breach the matter pleaded by the vendee was no answer to the pleas of the vendor, and that the latter was entitled to judgment.

the

the plaintiff, or his agent, an abstract of his, defendant's, title to the premises; and would, on or before the 30th *November* then next, deduce and shew forth a good and clear title thereto, and to every part thereof (except a certain right of free warren) to the plaintiff, and also that defendant would on or before the 8th day of *January* then next, on receiving the 21,020*l.* from the plaintiff, execute the proper conveyance for conveying and assuring the fee simple and inheritance of and in the said freehold premises to the plaintiff, his heirs and assigns for ever, and also for conveying, assigning, and assuring, all the interest in the leasehold premises to the plaintiff; and it was further agreed, that the said conveyances should be prepared by and at the expense of the plaintiff. Averment that the plaintiff was always ready and willing to have accepted a proper conveyance at his own expense, on having a good and clear title deduced and shewn; and also, on having such title as aforesaid, and having such conveyance made, to have paid the defendant 21,020*l.*, whereof the defendant had notice, and was requested by the plaintiff to shew forth, deduce, and make such good title, and to execute such conveyance. Breach, first, that the defendant did not nor would, on or before, &c. or at any time, &c. deduce or shew forth, or make a good and clear title to the said premises. Secondly, that the defendant did not nor would, on or before the said 8th day of *January*, or at any time, &c. execute a proper conveyance as aforesaid. The agreement was set out on oyer, containing the covenants stated in the declaration, (viz. to deliver an abstract on or before *October* 30th, to deduce a good title on or before *November* 30th, and to execute a conveyance on receiving the 21,020*l.*); to which was added

1833.

RIPPINGHALL
against
LLOYD.

1893.

—
RIPPINGHALL
against
LLOYD.

added a further agreement, that the conveyance should be prepared by or at the expense of the said *S. F. Rippinghall*; and further, that if the said *J. Lloyd* shall not deliver a full abstract of his title to the said several hereditaments and premises to the said *S. F. Rippinghall* or his agent before the said 30th day of *October* instant, and shall not verify the same by the production of all the deeds, evidences, and writings in support thereof, to the said *S. F. Rippinghall*, or his agent at *Norwich*, *Lynn*, or in *London*, before the said 30th day of *November* instant, and shall not deduce and shew forth a good and marketable title to the said several hereditaments and premises herein-before mentioned, on or before the said 30th day of *November* next, and shall not, on or before the 8th day of *January* next, by himself and all other proper and necessary parties, have executed the said conveyances at *Norwich*, at *Lynn*, or in *London*, and have delivered the same to the said *S. F. Rippinghall* on receipt of the said purchase-money, then and in any or either of the said cases, and immediately after the said 30th day of *October*, or the said 30th day of *November*, or the said 8th day of *January*, as the case may be, this present agreement shall be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred.

The defendant after pleading three pleas, which it is unnecessary to notice, pleaded, fourthly, to the first breach of covenant, that he did before the said 30th of *November*, to wit on, &c., by his agents, (an abstract of the title of the defendant to the said premises having been theretofore delivered by the defendant to the plaintiff), produce and shew forth unto agents of the plaintiff
in

in that behalf, divers deeds, &c., in part deducing and shewing forth a good and clear title to the said manors and premises; and that he the defendant, until and upon the same 30th of *November*, was ready and willing, by his agents in that behalf, to produce and shew forth unto the plaintiff or his agents in that behalf, divers other deeds, &c., completing the deduction and shewing forth of such title as last aforesaid, and would on or before, &c., have produced such other deeds to the plaintiff or his agents attending or appearing for that purpose according to the said agreement, and the defendant's said covenant in that behalf, whereof the plaintiff had notice; but that the plaintiff did not nor would on or before the same 30th of *November*, by himself or his agent or agents in that behalf, attend or appear for the purpose aforesaid.

Fifth plea, to the same breach of covenant, that before any breach, a new agreement (not alleged to be under seal) was made, extending the time for deducing title, and that title was deduced within that time.

Sixth plea, to the same breach of covenant, that after the committing of that breach, and before the exhibiting of the plaintiff's bill, to wit, on the first day of *December* 1827, by a certain agreement between the plaintiff and defendant, in consideration that defendant, at the request of the plaintiff, had then agreed to deduce and shew forth a good title to the said premises within a reasonable time in that behalf, and thereon and within a reasonable time, to make or cause to be made, a good and sufficient conveyance according to the terms of, and in the manner stipulated by, the said articles of agreement in the declaration mentioned, except as to time, the plaintiff agreed to accept such title and con-

1833.

RIPPINGHALL
against
LLOYD.

1833.

RIPPINGHALL
against
LLOYD.

veyance, and that the same agreement on the part of the defendant should be taken, and be as a substitution for the covenants of the defendant in the said articles of agreement in that behalf contained as to time, and the plaintiff accepted the said agreement so entered into between the plaintiff and defendant in full satisfaction and discharge of the damages by the plaintiff sustained by reason of the breach of covenant first above assigned, and thereby acquitted and discharged the defendant from the damages. The plea then stated that defendant was ready to fulfil the last mentioned agreement, but that the plaintiff did not, nor would by himself or his agent attend, so that such title might be deduced and shewn forth within such reasonable time, or at any other time, and wholly refused to accept such title and conveyance as aforesaid.

Eighth plea, as to the second breach of covenant, that defendant before, and until, and upon, the said 8th day of *January*, was ready and willing, with all necessary and proper parties, to execute proper conveyances, &c., and would so have done, if the plaintiff would have caused to be prepared and tendered such conveyances as aforesaid for the purpose aforesaid; but that the plaintiff did not prepare any conveyance whatever for the purpose aforesaid.

Special demurrer to the fourth, fifth, and sixth pleas. Replication to the eighth plea that the defendant did not, on or before the said 30th day of *November* next, or before the said 8th day of *January*, or at any time since the making of the said articles of agreement hitherto, although duly requested, deduce a good title to the said premises as by the said articles of agreement he was bound to do, wherefore the plaintiff did not nor could

could on or before the said 8th day of *January*, or at any time, prepare or tender or cause to be prepared or tendered such conveyances as in the eighth plea were mentioned, as he otherwise would have done. And, this, &c. Rejoinder, that although he the defendant, within a reasonable time in that behalf before the said 8th day of *January*, to wit, on, &c., was ready and willing and offered to deduce and shew forth, and would then have deduced and shewn forth a good title to the said premises, so that the plaintiff could and might on or before the said 8th day of *January* have prepared and tendered such conveyances as aforesaid if he the plaintiff would have had such title deduced and shewn forth as aforesaid, whereof the plaintiff then had notice, yet the plaintiff refused to have such title deduced, and wholly discharged the defendant from so deducing and shewing forth the same.

Surrejoinder, denying that defendant was ready and willing and offered to deduce title, &c. (as stated in the rejoinder) and concluding to the country. General demurrer and joinder.

Austin for the plaintiff. The fourth plea is bad, because it does not aver a performance of the covenant to deduce a good title, or any excuse for its non-performance. It imperfectly alleges a non-performance only, and professes to excuse the non-performance by reason that the plaintiff did not attend, without shewing any duty incumbent on him so to do, or place or time fixed for his so doing. The general principle is, that where a party is to do an act, he must either shew the act done, or if it is not done, at least that he has performed every thing that it was in his power to do:

1833.

 RIPPINGHALL
 against
 LLOYD.

1833.

—
 RIPPINGHALL
 against
 LLOYD.

Lancashire v. Killingworth (a) cited in a note to *Peeters v. Opie* (b). Here the covenant is unqualified, to deduce a good title. [Parke J. The question is, whether that covenant is affected by the subsequent stipulation, "that if *Lloyd* shall not deliver an abstract of his title to the plaintiff before the 30th of October, and shall not verify the same by the production of all deeds, &c. at *Norwich, Lynn*, or in *London*, the agreement shall be void."] That is a stipulation introduced for the benefit of the defendant, the vendor; as his deeds might be dispersed, a liberty to produce them at one of three places named is reserved to him; but in that case he must be bound to give notice at which of the three places he meant to produce them. It may be doubtful, even, whether, if such notice had been averred, it would have been sufficient; for if the presence of the party is not necessary, his absence will not excuse, though the act is to be done to him: *Comyns's Dig.* tit. Condition, (L. 5.) *Rolle's Abr.* tit. Condition, 457. l. 45. The defendant ought to have tendered a conveyance executed, *Standley v. Hemmington* (c), unless the vendee had dispensed with the vendor's tendering the deed: *Jones v. Barkley* (d). [Parke J. Here the deeds are to be verified, to shew the vendor or his agent that they agree with the abstract delivered.] Then the defendant did not give notice. In *Sugden on Vendors*, 9th edit. p. 245., it is said, "If either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal." *Standley*

(a) *Com. Rep.* 116.(b) 2 *Wms. Stund.* 352. note (3).(c) 6 *Taunt.* 561.(d) *Doug.* 684.

v. Hemmington (a) goes further, and shews that there ought to be a tender of conveyance executed, and demand of the money, and refusal to accept and pay.

1833.

RIPPINGMALL
against
LLOYD.

The fifth plea is bad, because it admits that the covenant was not performed within the prescribed time, and attempts to excuse the non-performance by an instrument not averred to be under seal: *Blemerhasset v. Pierson (b)*, *Rogers v. Payne (c)*, *Roe dem. Gregson v. Harrison (d)*, *Thomson v. Brown (e)*. [*Kelly*, for the defendant, here intimated, that he should not rely on this plea.] The same objection applies to the sixth plea. [*Parke J.* Not quite so; the new agreement is there pleaded as accord and satisfaction after the breach of the old.] Then the defendant must contend, that the first agreement had become void by reason of the stipulation, "that if the defendant should not deliver a full abstract of his title, and verify the same, &c. before the 30th of *November*, &c., the agreement shall be void to all intents and purposes." But that clause was introduced for the benefit of the purchaser only; otherwise the vendor, by neglecting to do the several acts stipulated on the days named, might have made the agreement void at his option. [*Parke J.* The word *void* in the agreement, means void at the option of the vendee. *Patteson J. Rede v. Farr (g)*, is an authority to that effect.] Then the same objection applies to this plea as to the last,—that it attempts to vary an instrument under seal by a parol agreement. Besides, if that plea is to be considered as a plea of accord, it ought to have been shewn to be executed. And further, it ought

(a) 6 Taunt. 561.

(b) 3 Levinz. 234.

(c) 2 Wils. 37c.

(d) 2 T. R. 425.

(e) 1 B. Moore, 358.

(g) 6 M. & S. 121.

1833.

RIFFINGHALL
against
LLOYD.

to have appeared that the new agreement, if performed, would have been a valuable consideration to the plaintiff for relinquishing the old: *Fitch v. Sutton* (a). [Parke J. That case does not apply, because this is an action for unliquidated damages.] In *Lobley v. Gildart* (b), it was held, that one obligation given in satisfaction for another was no discharge, whether grounded on an accord or not. [Parke J. There the bond had become absolute for a sum certain; that is very different from a covenant for unliquidated damages. An accord with mutual promises to perform is good, there being a remedy to enforce it (c).] Then the latter agreement ought to have been in writing, *Com. Dig. Action upon the Case upon Assumpsit*, (F. 3.); and it should have been so stated in the plea. Lastly, as to the pleading to the second breach, the rejoinder alleges, that the defendant was ready and willing to deduce a good title, so that the plaintiff might have prepared and tendered conveyances, but the plaintiff refused to have it deduced, and discharged the defendant from deducing it. The surrejoinder takes issue on that. By the demurrer to the surrejoinder, the defendant admits that, at the time in question, he was not ready and willing to deduce a good title; and if so, there could have been no tender of a conveyance as stated in the plea, and, consequently, no refusal to execute. The only meaning the defendant can have when he pleads that he was ready and willing, &c., is, that he had it in his power, but was discharged. He could not be discharged from what he could not do at the time. The issue was on his ability.

(a) 5 East, 230.

(b) 3 Lev. 55.

(c) *Com. Dig. Accord*, (B. 4.) See *Good v. Cheesman*, 2 B. & Ad. 328., judgment of Parke J.

Kelly contra. The whole question turns on the meaning of the defendant's covenant, which must be construed with reference to the whole of the articles of agreement. If what was covenanted to be done could not be done without the act of the plaintiff or his agent, and the defendant did what he could to perform the act, and it was owing to the plaintiff's default that it was not perfected, the plea is good. Now the declaration states three covenants, first, to deliver an abstract on or before the 30th of *October*; secondly, to deduce a good title on or before the 30th of *November*, and thirdly, to execute a conveyance. What is the meaning of the words "deduce a good title?" If it consisted of a single act, as payment of money, or delivering an abstract, or any other thing which might be done in the plaintiff's absence, the principle of the authorities cited might apply, the money might be paid or the abstract delivered in the plaintiff's absence; but looking at the covenant here, and the nature of it, it could not be performed without the attendance of the plaintiff or his agent. In the ordinary course of dealing, the abstract is delivered, objections are made, and requisitions stated; the production of marriage certificates and deeds or attested copies is required. If they are in the custody of third persons, it is sufficient to produce attested copies with an intimation that the originals are in such a place, and that they may be compared if the purchaser will attend. As far as appears, all that was required here was done. It is true that the deeds were to be produced at one of three places, and the plaintiff, the purchaser, would have been obliged to attend at one of the three places if the vendor had been ready there to deduce title; but he could make title by the attested copies, though

1838.

RIFFINGHALL
against
LLOYD.

1893.

RIFFINGHALL
against
LLOYD.

he would be bound to give the purchaser the means of comparing them with the originals. The fourth plea alleges, that the defendant was ready and willing to deduce title, and what more could he do? [*Taunton J.* He might have given notice *at which* of the three places mentioned, he would be ready and willing to produce the deeds, he having the liberty to produce them at one of the three; how could the plaintiff know at which of the three he was to attend?] In substance it is alleged that he did give notice. The deeds may have been in many different places. The only question is, whether it must not be assumed that he gave such notice as was necessary. It was not necessary to state every place in which the deeds were. If it appears with reasonable certainty, that he has done what was necessary, that will be sufficient. The attending must have been where the deeds were. How could he be ready and willing (as alleged) to produce the deeds completing the title, to the plaintiff, or his agent attending, unless it be assumed that the deeds were at the place where the plaintiff was to attend? [*Taunton J.* Surely it cannot be contended, on an agreement so generally worded as this, that if the deeds were in a hundred places, the vendee must attend personally at every place where they are.] That is not necessary, but if the vendee insist on seeing the original deeds and they are in so many places, he must by himself or his agent attend at places where they are. [*Taunton J.* Every prudent vendee would see the original title deeds. The common course is, that first an abstract is delivered, then the original deeds are exhibited, and the vendee's attorney compares them with the abstract.] Those of which the vendor is in possession, he

he must produce and deliver over, but to those which are not under his control, access can only be had in the hands where they are. The vendor must produce attested copies, and refer the vendee to the places where the originals are to be seen. [*Parke J.* If deeds are in the hands of third persons, the vendor should qualify his covenant.] That is the effect of the covenant here. [*Parke J.* If the plea had alleged that the vendor had pointed out that the deeds were in certain places, and the vendee had refused to look at them, the case might have been different, but he has entered into an unqualified covenant, and must take the consequence whatever it may be.] The question here is, what the consequence ought to be. If it be as contended, all the forms of conveyance must be altered. [*Parke J.* The question here is one of strict law, and arises on special demurrer.] The law must be with reference to practice and the subject matter. [*Taunton J.* I think the law always, *primâ facie*, intends that the vendor has the deeds in his possession, or at least under such control, that he can produce them when necessary. *Patteson J.* You have not stated that you did give the vendee the means of inspecting the deeds, in the way even that you say would be sufficient.] As to the objection taken to the sixth plea, that it does not state the subsequent agreement to have been in writing, the defendant craves leave to amend. [*Parke J.* The Court will give leave, if you can make any thing of the substituted contract. *Patteson J.* If you amend, you must not assume that you are right as to the accord and satisfaction.] Then as to the pleadings on the last breach. The covenant of the vendor, to execute a conveyance, depends on a condition precedent

1833.

 RIPPINGHALL
 against
 LLOYD.

on

1833.

——
 RIPPINGHALL
 against
 LLOYD.

he would be bound to give the purchaser the means of comparing them with the originals. The fourth plea alleges, that the defendant was ready and willing to deduce title, and what more could he do? [*Taunton J.* He might have given notice *at which* of the three places mentioned, he would be ready and willing to produce the deeds, he having the liberty to produce them at one of the three; how could the plaintiff know at which of the three he was to attend?] In substance it is alleged that he did give notice. The deeds may have been in many different places. The only question is, whether it must not be assumed that he gave such notice as was necessary. It was not necessary to state every place in which the deeds were. If it appears with reasonable certainty, that he has done what was necessary, that will be sufficient. The attending must have been where the deeds were. How could he be ready and willing (as alleged) to produce the deeds completing the title, to the plaintiff, or his agent attending, unless it be assumed that the deeds were at the place where the plaintiff was to attend? [*Taunton J.* Surely it cannot be contended, on an agreement so generally worded as this, that if the deeds were in a hundred places, the vendee must attend personally at every place where they are.] That is not necessary, but if the vendee insist on seeing the original deeds and they are in so many places, he must by himself or his agent attend at places where they are. [*Taunton J.* Every prudent vendee would see the original title deeds. The common course is, that first an abstract is delivered, then the original deeds are exhibited, and the vendee's attorney compares them with the abstract.] Those of which the vendor is in possession,

he

he must produce and deliver over, but to those which are not under his control, access can only be had in the hands where they are. The vendor must produce attested copies, and refer the vendee to the places where the originals are to be seen. [*Parke J.* If deeds are in the hands of third persons, the vendor should qualify his covenant.] That is the effect of the covenant here. [*Parke J.* If the plea had alleged that the vendor had pointed out that the deeds were in certain places, and the vendee had refused to look at them, the case might have been different, but he has entered into an unqualified covenant, and must take the consequence whatever it may be.] The question here is, what the consequence ought to be. If it be as contended, all the forms of conveyance must be altered. [*Parke J.* The question here is one of strict law, and arises on special demurrer.] The law must be with reference to practice and the subject matter. [*Taunton J.* I think the law always, *prima facie*, intends that the vendor has the deeds in his possession, or at least under such control, that he can produce them when necessary. *Patteson J.* You have not stated that you did give the vendee the means of inspecting the deeds, in the way even that you say would be sufficient.] As to the objection taken to the sixth plea, that it does not state the subsequent agreement to have been in writing, the defendant craves leave to amend. [*Parke J.* The Court will give leave, if you can make any thing of the substituted contract. *Patteson J.* If you amend, you must not assume that you are right as to the accord and satisfaction.] Then as to the pleadings on the last breach. The covenant of the vendor, to execute a conveyance, depends on a condition precedent

1833.

 RIPPINGHALL
 against
 LLOYD.

on

1833.

—
 RIPPINGHALL
 against
 LLOYD.

on the part of the plaintiff, though contained in a separate clause, "that the conveyances *shall be prepared by him or at his expense.*" The defendant, therefore, could not be called on to execute a conveyance, which was to be prepared by or at the expense of the plaintiff, till such conveyance had been prepared. The defendant, therefore, has pleaded that no conveyance was prepared. Then the replication, admitting that this would be an answer, states a new cause of action, that the defendant did not deduce title.

PARKE J. (a) Your argument as to that is, that the plaintiff's remedy is on the first breach; for if he was prevented from tendering a conveyance, whatever the reason might be, still, a conveyance not being tendered to you, you were not bound to execute. The judgment must be for the defendant as to this;—but the plaintiff is entitled to judgment on the demurrer to the fourth plea, because, by a general covenant, the vendor undertakes to make out title at his own peril; and even if the covenant here is to be taken as qualified by the condition, the plea ought to have stated that he gave notice that he would produce the deed at one of the three places.

TAUNTON and PATTESON Js. concurred.

Judgment for the plaintiff on the demurrer to the fourth and fifth pleas. The defendant to be at liberty to amend the sixth plea, by stating the agreement to have been in writing. Judgment for the defendant on the demurrer to the surrejoinder.

(a) DENMAN C. J. was absent.

1833.

DOE dem. EMMA ROGERS and Others *against*
FRANCIS COOTE ROGERS and Others.

EJECTMENT. At the trial before *Taunton J.*, at the Spring assizes for the county of *Salop*, 1833, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—The lessors of the plaintiff produced indentures of lease and release, bearing date the 24th and 25th of *September* 1830, made for the purpose of suffering a common recovery, whereby it was agreed that the recovery should enure to the use of the lessors of the plaintiff for the term of 1000 years. The release contained a power to *Elizabeth Rogers* to demise or lease the said premises for any term not exceeding ten years from the day of the date thereof, or seven years from the day of the decease of the said *E. Rogers*, to take effect in possession, so as there should be reserved in such lease the best rent that could be gotten for the same without taking any premium for the making thereof. The defendants put in a lease of the 17th of *September* 1831, whereby *Elizabeth Rogers*, in consideration of the yearly rent therein reserved, and the covenants and agreements therein contained on the part of the lessee, did demise and lease unto *Francis Rogers* the premises in question, to hold to him, his executors, &c. for the term of seven years, to be computed from the day of the decease of the said

A power was reserved to grant leases for a term not exceeding seven years, so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof. The donee of the power granted a lease for seven years, at a specified rent, which lease contained a covenant by the lessee, to find board, lodging, and wearing apparel during the term, for three children of the donee (if they wished it), at 7*l.* a year each, and for the donee's son gratis: Held, by *Parks* and *Patteson J.* (*Taunton J.* dissentiente) that assuming the power to require two conditions,

first, that the rent reserved should be the best rent; and, secondly, that there should be no fine or premium; it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, *parol* evidence was admissible to shew that the rent reserved was the best that could be obtained.

Elizabeth

1833.

—
Dor dem.
ROGERS
against
ROGERS.

Elizabeth Rogers, yielding and paying yearly during the said term unto *Milward Rogers*, or to the person, who, for the time being, should be entitled to the freehold and inheritance of the said demised premises immediately expectant on the decease of the said *E. Rogers*, the yearly rent of 150*l.*, to commence at the expiration of six months from the decease of the said *E. Rogers*. The lease contained a covenant by the said *Francis Rogers*, to pay the rent and all taxes, &c.; to keep the premises in good repair during the term, and to manage the said lands, &c. in a husbandlike manner. And the said *Francis Rogers*, for himself, his executors, administrators, &c., covenanted with the said *E. Rogers*, her heirs and assigns, that he would, upon the commencement, and from thenceforth during the continuance of the said term, if *Martha Rogers*, *Margaret Rogers*, and *Mary Rogers*, the three younger children of the said *Elizabeth Rogers*, or any or either of them, should be so minded and desirous, permit and suffer them, and any or either of them, to reside with him the said *F. Rogers*, and as part of his family in and upon the said dwelling-house and premises, then in the occupation of the said *Elizabeth Rogers*, for so long as they, the said three children, or any or either of them should think proper; and also that he should, during the time the said children should so continue to reside with him, find, provide, and allow unto each of them good and sufficient and suitable meat, drink, and lodging, upon being paid for the same by each of them, the sum of 7*l.* sterling per annum, and so in proportion for any less period than a year; and also should, during the term, permit and suffer *Edward Cooke Rogers*, one of the sons of the said *Elizabeth Rogers*, to reside with him in and upon the same dwelling-

dwelling-house and premises, and at the sole expense, cost, and charges of him, *Francis Rogers*, his executors, administrators, &c., find, provide, and allow unto the said *E. C. Rogers*, sufficient board, lodging, and wearing apparel, without having or being paid any compensation for the same. *Elizabeth Rogers* died soon after the lease was granted. It appeared by affidavit that *Edward Cooke Rogers* was of the age of thirty-five years, *Margaret Rogers* twenty-nine, and *Martha and Mary Rogers* twenty-four. It was contended for the plaintiff, that the covenants to maintain the lessor's children were in the nature of a premium, and that, therefore, the lease was void on the face of it. For the defendant it was argued that it was a question for the jury, whether the rent reserved was not the best rent that could be obtained; and evidence was tendered to shew that before the lease was executed the land had been valued, and the rent reserved in the lease had been fixed by a person of competent skill without any reference to the covenants by the lessee to maintain the lessor's children. The learned Judge was of opinion, that these covenants were in the nature of a premium taken by the lessor, and that the taking of any premium whatever made the lease absolutely void; and that as it appeared on the face of the lease a premium had been taken, parol evidence was inadmissible: he therefore directed the jury to find a verdict for the lessor of the plaintiffs. A rule nisi for a new trial was obtained by *Maule*, on the ground of misdirection and the improper rejection of evidence.

1893.

Doz dem.
Rogers
against
Rogers.

Whateley, on a former day in this term, shewed cause. The condition in the leasing power is twofold: first, that the best rent be obtained; and, secondly, that no premium

1833.

DOX dem.
ROGERS
against
ROGERS.

premium be taken. The lease was void, first, because the best rent was not reserved ; and, secondly, because the covenant by the lessee to board and lodge the children of the lessor, was in the nature of a premium taken by the lessor. As to the first point, it is stated in *Sugden on Powers*, 5th edit., p. 626, that in the *Queensberry* case (a), Lord *Eldon* said, " There is but one criterion which our Courts always attend to as a leading criterion in discussing the question, whether the best rent has been got or not : that is, whether the man who makes the lease has got as much for others as he has for himself ; for, if he has got more for himself than for others, that is a decisive evidence against him. The Court must see that there is reasonable care and diligence exerted to get such rent as, care and diligence being exerted, circumstances mark out as the rent likely to be obtained." And in the same work, p. 624., it is stated by the author to be clear, that " under a power to lease at a rack-rent, improvements by the tenant, however valuable, will not authorize a lease at an under value ; and if a fine be taken, the lease cannot be supported, not only because it is against the intent of the power, express or implied, but because it is evident that, *however considerable the rent*, it might have been increased if the fine had not been taken." The very taking of a fine, therefore (which in effect was done here), shews that the best rent has not been obtained. Secondly, the covenant to provide board and lodging gratuitously for one of the children of the lessor was in the nature of a premium, and, if any premium whatever was taken, the lease is not within the power, and parol

(a) See 1 *Bligh*, 427.

evidence was inadmissible to shew that the best rent was reserved. That covenant was an advantage to the tenant for life, and not to the reversioner. *Roe v. The Archbishop of York* (a) may be cited to shew that the question, whether the best rent was reserved, ought to be submitted to the jury; but in that case there was nothing in the nature of a fine or premium taken, and the same observation applies to *Doe v. Radcliffe* (b).

1833.

DON dem.
ROGERS
against
ROGERS.

Maule and R. V. Richards contra. The evidence proposed to be given was, that the land was valued and the rent was agreed on, and the draft of the lease prepared, without reference to any covenant for the boarding and lodging of the lessor's children. If that evidence had been received, it would have been a question for the jury whether the best rent had been reserved. But it is said that, although that may be so in an ordinary case, yet here the covenant to board and lodge the children of the lessor is in itself a premium; and, that being so, parol evidence was not admissible to shew that the best rent had been obtained. Now, assuming first, that a benefit to the tenant for life was equivalent to a premium, here, the children were adults, and therefore not persons whom the lessor was bound to maintain. The covenant by the lessee to maintain them was, therefore, no advantage to the lessor. The plaintiff reads the leasing power as if it contained two conditions, one, that the best rent be reserved, and the other, that no premium should be taken; but that is not the true construction: in truth they constitute but one condition. The words, "without taking any premium," are a qualification of the pre-

(a) 6 East, 86.

(b) 10 East, 278.

ceding

1833.

Doe dem.
ROGERS
against
ROGERS.

ceding words, and the whole sentence imports that "such a rent be reserved as is the best without taking any premium." Now, assuming that to be the true construction of the power, the question is, whether the covenant that the lessee shall board and lodge three children of the lessor, can be considered a premium. A premium is something paid or agreed to be done, in respect of which a less amount of rent is agreed to be paid. It must depend on evidence aliunde as to the adequacy of the rent, whether the thing agreed to be done was in the nature of a premium. Suppose the lessee had covenanted to go to *York*, and to receive 30*l.*, whether that might or might not be a benefit to the lessor would depend upon this, whether 30*l.* was a proper compensation to the lessee for going to *York*. That could not be ascertained without the intervention of a jury. So here the question, whether the covenant to maintain the lessor's children was in the nature of a premium, will depend on the adequacy of the rent. As to Lord *Eldon's* dictum, cited in *Sugden on Powers*, this falls within the latter part of it, for the evidence here offered was to shew that reasonable care and diligence had been exerted to obtain the best rent. The question as to the adequacy of the rent is undoubtedly for the jury: *Roe v. The Archbishop of York* (a) and *Doe v. Radcliffe* (b). In *Shannon v. Bradstreet* (c), Lord *Redesdale* held that a lease made under a power "to lease without fine at the best improved yearly rent that could be had," was not necessarily void, though containing a covenant to lay out 200*l.* in improvements, "if the rent were, notwithstanding, the best that could be got."

(a) 6 *East*, 86.(b) 10 *East*, 278.(c) 1 *Sch. & Lef.* 72.

PARKE J., on a subsequent day of the term, delivered judgment as follows: — This case was argued a few days ago before my brother *Taunton*, my brother *Patteson*, and myself; the only question was, whether a lease by tenant for life, under a settlement, was conformable to a leasing power therein contained. The learned Judge then stated the terms of the power and of the lease, and proceeded as follows: —

On the trial, the learned counsel for the defendant offered evidence to prove that the rent was the best that could be obtained; but my brother *Taunton* rejected it, and held that the lease was, upon the face of it, void. The question is, whether that ruling was right. It seems to my brother *Patteson* and myself that it was not, and that there should be a new trial.

Unless the Court can pronounce that it is *impossible* that the lease can be a valid execution of the power, *under any circumstances*, the defendant is entitled to have his parol evidence submitted to a jury. What conclusion they ought to come to is quite a different question.

The power requires that the best rent should be reserved that could be gotten, without taking a fine or premium for the making it. Assuming the power to require two conditions, first, that there should be the best rent, and, secondly, that there should be no fine or premium (and that is to put the case the most strongly against the defendant), the question is, whether, upon the face of the lease, it clearly and incontrovertibly appears that either of the conditions has not been performed?

First, as to the fine or premium; in the ordinary acceptance of those terms, none is paid or taken: and

1833.

DOX dem.
ROGERS
against
ROGERS.

1833.

Dox dem.
 ROGERS
 against
 ROGERS.

if benefit to the tenant for life be equivalent to a fine or premium, none appears; for it does not necessarily follow that the covenants to support the children are beneficial to the mother, the tenant for life, as all the children were grown up and bound to maintain themselves, and after the death of the lessor, she could not be bound to maintain them. Besides, so far as relates to the daughters, it is impossible for the Court to say, that the contract is *necessarily* beneficial to the lessor, if she was bound to support them, for it *may* be beneficial to the lessee; and so far as relates to the son, it is possible that there may have been some collateral consideration for it, as, for instance, a bequest of the personal estate of the lessor to the son, the lessee (a). If, then, the Court cannot pronounce that there has been a fine or premium, the only remaining point is, whether *they* can say that the rent is not the best that could have been gotten?

That this is, generally, a question for the jury, cannot be doubted: does the existence of the above-mentioned covenants make it no longer so? Are they so clear a proof that the lessee would have paid more, and consequently that this rent is not the best, that no evidence could ever prove the contrary?

We conceive that they are not *conclusive* of this question, and though it is highly probable a jury would think that the best rent was not reserved, it is certainly *possible* that such evidence may be adduced as to prove that it was.

The case of *Shannon v. Bradstreet* (b), before Lord *Redesdale*, is a distinct authority on this part of the

(a) The lessee was a son of the lessor.

(b) 1 *Schoales & Lefroy*, 52.

case, for he held, that a covenant in the lease to lay out 200*l.* in improvements, did not necessarily shew that the rent was less than might have been obtained. For these reasons we think the case ought to go to a new trial.

1833.

*Doz dem.
Roxas
against
Roxas.*

TAUNTON J. I retain the opinion which I held at the trial, that the covenant to maintain the children of the lessor was in the nature of a premium, and that the taking of that premium was a breach of the condition in the power, which could not be explained by parol evidence. I take it that the word premium does not necessarily mean a money consideration; but that money's worth may constitute a premium. A covenant to maintain and support three of the lessor's children at an adequate price would not be a premium. But allowing that the question of inadequacy may be the subject of parol evidence, the obligation to maintain and support one of the lessor's children gratuitously, is, I think, according to the common course of things, necessarily a loss to the lessee, and a benefit to the lessor, and cannot be explained away. The question here is not simply whether the best rent that could be got was obtained, but also whether the lease was granted on a premium. The condition in the power is twofold; first, that the best rent shall be reserved; and, secondly, without a fine or premium. That implies that no fine or premium shall be taken. The evidence offered, and which I thought inadmissible, was to shew that in fact the best rent had been reserved. Assuming that to be so, still if a premium was taken, there was a breach of the condition in the leasing power. One reason for the condition in these leasing powers, that

1833.

—
Doe dem.
ROGERS
against
ROGERS.

no premium shall be taken, is, I imagine, to provide against the uncertainty of parol evidence in the doubtful question, what was the best rent that could be got when the lease was granted, which in the case of old leases may be at a very distant period. If any premium whatever was taken, that seems to me a breach of the condition in the power. A power to lease should be construed strictly and rigorously, because it is a power to be exercised over property which upon the death of the donee belongs to another. I am unwilling to relax the rigor of the rule, and if once a door is opened to evasion by nice distinctions, there is no saying where it will end.

As, however, my brothers think there should be a new trial, the rule must be absolute.

Rule absolute (a).

It was contended by *Whately* on the argument, that if the objections to the lease were not tenable, the plaintiff was still entitled to recover on the demise of the trustees of the term for 1000 years. But the Court said, that that term was subservient to the leasing power, and consequently was no answer to the action, provided the lease were good; and they referred to *Doe dem. Courtail v. Thomas*, 9 B. & C. 288., as in point.

(a) In the beginning of the statement, p. 755., the words "the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case," should be omitted, for the question was argued and determined on a rule for a new trial, not on a special case.

1833.

DOE, on the several Demises of ELIZABETH GRIFFITH, of SUSANNAH EVANS, of the said ELIZABETH GRIFFITH and SUSANNAH EVANS, of the said ELIZABETH GRIFFITH, SUSANNAH EVANS, and HUMPHREY EVANS, and of the said HUMPHREY EVANS, *against* HUGH PRITCHARD, JOHN ROBERTS, and ELIZABETH JONES.

EJECTMENT for a messuage and lands at *Llanfawr, Merionethshire*. At the trial before *Bayley B.*, at the *Bala* Spring assizes, 1833, a verdict was found for the defendant, subject to certain points, upon which the learned Judge reserved leave to move to enter a verdict for the plaintiff. On a motion being made for that purpose in *Easter* term, 1833, the Court directed that the facts should be put into a special case, which was stated, in substance, as follows : —

The premises in question were conveyed by lease of the 25th of *February* 1775, made between *Richard Price Thelwall* of the one part, and *Evan Griffith* of the other part, whereby *Thelwall* demised, granted, leased,

Ejectment may be maintained for freehold lands, on the demise of a person attainted of felony, when there has been no office found on behalf of the king.

A lease for three lives contained a proviso, that if the lessee, his heirs, &c. should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the

management of the farm, the demise should from thenceforth cease and be absolutely void. Tenant (being the second cestuy que vie) under such lease, was attainted of felony, and transported. His mother and sister occupied the farm from that time, till the expiration of the third life named in the lease, and during that period the reserved rent was regularly paid to *R. W. P.*, to whom the reversion had come by devise, and who knew all the facts. The time of his becoming entitled did not appear. The reversioner, on the expiration of the third life, supposing that the term was at an end in point of law, let the land to a new tenant, whom he afterwards ejected, the attainted party being still alive.

Quære, whether the attainder of the tenant was a forfeiture of the lease; but, held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction :

Quære also, if a forfeiture was committed, whether it was one of which an assignee of the reversion might take advantage by stat. 32 H. 8. c. 34.

Held, that if such a forfeiture was committed, the reversioner had waived it by accepting the reserved rent under the lease, from the parties occupying the premises :

Semhle, that if the forfeiture had not been waived, a sufficient entry had been made to avoid the lease.

1839.

DOX dem.
GRIFFITH
against
PRITCHARD.

set and to farm let unto the said *Evan Griffith* the premises in question, habendum to the said *E. G.*, his heirs and assigns, from, &c., for and during the natural lives of the said *Evan Griffith*, *Humphrey Evans* his son, and *Elizabeth Evans* his daughter, and the life of the longer liver and survivor of them, at the yearly rent of 20*l.*, payable to *Thelwall*, his heirs or assigns. The lease contained a clause of re-entry in case of nonpayment of rent for the space of twenty days (the same being first lawfully demanded), and also the usual covenants on the part of the lessee. After which was the following clause:—

“ Provided, &c., that in case the said *Evan Griffith*, his heirs and assigns, shall at any time hereafter grant, demise, set, let, or assign over the said demised premises, or any part thereof, or deposit, pledge, or mortgage this present lease as a security for any sum or sums of money, without the consent in writing of the said *R. P. Thelwall*, his heirs or assigns, being first had and obtained, to or with any person or persons whatsoever, or in case the said *E. G.*, his heirs and assigns, shall hereafter, during the continuance of this lease, happen to become insolvent, and unable in circumstances to go on with the management of the said farm and demised premises, that then and in any and either of those cases this present demise, and every matter and thing therein contained, from thenceforth shall cease, determine, and be absolutely void, to all intents and purposes whatsoever.” The lessor covenanted for quiet enjoyment by the lessee, he paying the rent and performing his covenants.

The lease was duly executed and livery of seisin given. *Evan Griffith* occupied the premises under this lease

lease to the day of his death, which took place on the 1st of *April* 1797. After his death, *Humphrey Evans*, his son and heir at law, and one of the lives named in the lease, became entitled to the estate as special occupant.

At the great sessions for the county for *Merioneth*, held in *April* 1801, the said *Humphrey Evans* was convicted of felony, (sheep stealing,) and on that conviction was transported for life to *New South Wales*. No inquisition was taken, and no office found for the crown, of the lands and tenements of the said *H. E.* on his said conviction and attainder, neither has any entry ever been made on behalf of the crown into or upon the estate in question.

After the departure of the said *H. E.*, the premises were occupied and the farm managed by *Elizabeth Griffith*, the widow of *Evan*, the original lessee, and mother of *H. E.*, until her death in *March* 1812; after which *Susannah Evans*, the daughter of the said *Evan* and *Elizabeth Griffith*, and sister of the said *H. E.*, continued in possession and management of the farm until the death of *Elizabeth Evans*, the third life named in the lease, which took place on the 24th of *January* 1816.

During the whole of this period, the reserved rent was regularly paid to the person entitled to the reversion, who had full knowledge of the conviction of *Humphrey Evans*. Immediately after the death of the said *Elizabeth Evans*, *Richard Watkin Price*, to whom the reversion had come by devise, supposing the estate to have been determined by the death of the last cestui que vie, let the same premises at an increased rent of 40*l.* to *John Evans*, another son of the above named *Evan* and *Elizabeth Griffith*, who then resided on the premises

1833.

—
Dor dem.
GRIFFITH
against
PRITCHARD.

1838.

DOX dem.
GRIFFITH
against
PRITCHARD.

with his sister, the said *Susannah Evans*. *John Evans* occupied the premises until *July* 1819, when Mr. *Price* brought an ejectment on that letting, and recovered possession.

The said *Humphrey Evans* was alive on the day of the demise laid in the declaration, a convict settled in the colony of *New South Wales* (a).

(a) Before the trial it was ordered by the Lord Chief Justice, by consent of the parties, on summons, pursuant to Reg. Gen. 20., *Hil.* 4 W. 4. (p. xvii. post.), "that an examined copy of the muster-roll of convicts from *New South Wales*, filed with the Secretary of State for the Home Department, be received and read in evidence on the trial of this cause, as proof of the existence of *Humphrey Evans* in the declaration in this cause mentioned, on the 31st day of *December* 1828." A writing was accordingly produced at the trial, headed, "*New South Wales*, census taken in the month of *November* 1828;" and stating, under distinct heads, in several columns, the name, age, sentence, employment, and residence of *Humphrey Evans*, the date of his transportation, and some other particulars; to which was added a certificate, signed *John Henry Capper*, and stating that the above was a true extract of the muster-roll, which muster-roll was deposited in the office of the Secretary of State for the Home Department. The witness who produced it, together with the Lord Chief Justice's order, had compared the extract with the roll. It was objected at the trial, that there was no evidence to shew that the document from which this extract purported to be taken, was in reality a muster-roll or authentic account of the convicts at *New South Wales*; and that the Lord Chief Justice's order, merely authorising the plaintiffs to read the extract, did not cure the defect, since the extract could not be better evidence than the roll itself, and the objection would have applied to that if produced. And it was further urged, that the evidence adduced did not shew the identity of *Humphrey Evans* mentioned in the extract with the *Humphrey Evans* mentioned in the declaration. *Bayley B.* was of opinion, that as the Judge's order, consented to by the defendants, assumed the existence of a muster-roll at the Secretary of State's office, from which an extract might be taken for the present purpose, the objection could not prevail. He also thought that the order precluded any question on the subject of identity; but he reserved both points. On the motion to enter a verdict for the plaintiff, *J. Jervis* for the defendants renewed the objections, but the Court (*Denman C. J.*, *Littledale*, and *Parke J.*) concurred in the opinion expressed by *Bayley B.* at the trial.

The

The questions for the opinion of the Court were: —

1. Whether the estate of *Humphrey Evans* was divested out of him by his attainder and conviction, without office found or entry made by or on behalf of the crown.

2. If not, whether *H. E.* had capacity to demise on the day of the demise laid, viz. *January 1st, 1827.*

3. Whether the estate was determined by breach of the proviso in the lease, that the same should be void if *Evan Griffith*, his heirs or assigns, should become insolvent and unable in circumstances to go on with the management of the farm and premises.

This case was argued in the present term, *November 15th.*

J. H. Lloyd for the plaintiff. (As to the first point, *Sir J. Campbell*, Solicitor-General, for the defendants, admitted that *Humphrey Evans* having taken a freehold estate as special occupant (*a*), such freehold was not divested without office found.) The second proposition on the part of the plaintiff, viz. that *Humphrey Evans* had capacity to demise, is a corollary from the first. In *Nichols v. Nichols* (*b*) the question was put, “if the possession in deed or in law of the lands of a person attainted of treason shall not be in the king before office found, in whom shall it be by the course of the common law in the life of the person attainted?” And it was held that the freehold of such lands would be in fact in the person attainted, as long as he should live: “for as he hath capacity to take in deed lands by a new purchase, so hath he power to retain his ancient possessions, and

1833.

Don dem.
GRIFFITH
against
PRITCHARD.

(*a*) 2 *Black. Comm.* 259.

(*b*) *Plowd.* 486.

1833.

—
 Doe dem.
 GRIFFITH
 against
 PRITCHARD.

he shall be tenant to every præcipe." Except as to the king, who has an inchoate right capable of being perfected by office and seizure, the attainted party has a good right against all the world, and may grant in virtue of such right, though the title which he conveys is defeasible, being subject to the king's paramount right. This doctrine, as to attainted persons, is supported by 2 *Shepp. Touchst.* 232. 7th edit., and Mr. *Preston's* addition to the original passage. So an alien may purchase and grant, and may suffer a recovery. 2 *Shepp. Touchst.* 232. 2 *Vin. Abr. Alien*, (A), pl. 18. The case of an attainted person granting is analogous to that of a copyholder making a lease without licence or special custom. Such lease is a cause of forfeiture, but until the lord takes advantage of it, it is good as to every one else: *Gilbert on Tenures*, 213. and note xcii. by *Watkins*, 5th edit. And, according to the reasoning in that note, the Court, in the present case, will not arbitrate upon the question of rights between the attainted party and the king, but will decide the cause as between the present claimants. The king has done nothing to enforce his right; and a freehold estate must be determined by some formal act.

Then as to the third point. The estate here was determinable upon a contingency. The Court cannot say that that contingency has ever happened. Conditions which lead to forfeiture are to be construed with great strictness. *Co. Litt.* 218. a., *Adams on Ejectment*, page 176. 3d edit., *Doe dem. Abdy v. Stevens* (a), per Lord *Tenterden*. The condition here refers to a pecuniary inability. It is true that the felon's goods are

(a) 3 B. & Ad. 303.

forfeited on conviction, but they may not be seized, and until they are, they remain in the felon's hands. There is no proof here that they were seized, and the Court will not assume that fact and the consequent pecuniary deficiency. The party may still have carried on the farm by his agents, or by his under-tenants, if the landlord did not enforce the covenant against underletting. The mere absence of the convict would not occasion a forfeiture, if it were not coupled with insolvency.

In the first place, therefore, the contingency upon which this estate was determinable, never happened. Secondly, if it did happen, there ought to have been a re-entry by the landlord; for the estate, commenced by livery, ought also to have had a formal termination. And further, on the contingency happening, the estate was voidable only; the facts may shew an intention not to avoid it, and, if that appear, the forfeiture is purged. If the contingency ever happened, it occurred on the conviction, and that was not a continuing breach. The lord, after notice of the conviction, accepted rent, and consequently he waived the forfeiture; and not merely the forfeiture, but the condition itself, according to *Co. Lit.* 211. b. [*Taunton J.* There is a difference between waiving the condition, as in *Dumport's* case (*a*), and waiving the particular breach. The Courts in modern times have been inclined, in such cases, to consider the breach overlooked rather than the condition waived; as in *Doe dem. Boscawen v. Bliss* (*b*). But the waiver of the condition is not necessary to your argument.] In the modern cases, where the construction just mentioned has been adopted, the breach has been occasioned by

1833.

—
Doe dem.
GRIFFITH
against
PITCHARD

(*c*) 4 Rep. 119 b.(*b*) 4 Taunt. 735.

1833. some act of the lessee, and the Court has held that he

DOE dem.
GRIFFITH
against
PRITCHARD.

could not, by his own misconduct, make the lease void whether the lessor desired it or not. It was so in *Doe dem. Bryan v. Bancks* (a); and the same reason applies to *Doe dem. Ambler v. Woodbridge* (b). In *Roberts v. Davy* (c), a licence to mine was granted, with a condition that it was to become void if the grantee should neglect for a certain time to work the mines; and it was held that, on breach of the condition, the licence was voidable only at the election of the grantor. In these three cases there was a continued breach, by the voluntary act of the grantee, and it was considered that the grantor did not, by omitting at some time during such continuance to avail himself of the breach, forego his right to do so at a subsequent time. In these cases, if they had been decided otherwise, the grantee would have benefited by his own wrong in continuing the breach. But here the forfeiture accrued, not by the continuance of an act but by the happening of an event, which, having once occurred, all beyond it was out of the lessee's power: nor did he afterwards commit any voluntary default, for the management of the farm went on as before.

Assuming, however, that in this case there was a breach, and a continuing one, no entry was ever made for the purpose of taking advantage of it. It may be a question whether *Price* had any right so to enter. He could not do it before his title accrued. The case does not shew whether he became reversioner before or after the alleged forfeiture; but when he had become so, he had no right of entry at common law; and,

(a) 4 B. & A. 401.

(b) 9 B. & C. 376.

(c) 4 B. & Ad. 664.

whether

whether or not this was one of the cases in which a right of entry is transferred to the assignee of the reversion by stat. 32 H. 8. c. 34., would depend upon another question, viz., whether the condition here has reference to a collateral act, or to a thing incident to the reversion, like payment of rent, or forbearing to do waste (a). But, however this may be, *Price* never did enter. It is not enough that he ultimately came into possession. There should have been such an entry as evinced an intent to take advantage of the condition broken. Where an estate is not void, but only voidable at the will of the lessor, there must be a formal act to shew that he intends to avoid the estate by reason of the forfeiture. "Regularly when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim, and also the feoffor or grantor may waive the condition at his pleasure;" *Co. Lit.* 218. a., where examples are given in illustration of this doctrine. The language of Lord *Kenyon*, and of *Buller* and *Ashhurst* Js., in *Roe dem. Tarrant v. Hellier* (b), shews the strictness with which the proceedings of the lord are to be regarded in enforcing such a right of entry. It does not appear, in the present case, that the landlord entered with the intention of enforcing the forfeiture. He entered, as the case states, supposing the estate to have been determined by the death of the last cestui que vie. No case has been found expressly deciding that an entry for forfeiture must appear to have

1833.

DOE dem.
GRAFFITH
against
PRITCHARD

(a) See 1 *Wms. Saund.* 288 b. note (16).

(b) 3 T. R. 169, 172, 173.

been

1833.

DOX dem.
GRIFFITH
against
PRITCHARD.

been made eo intuitu; but on principle it should seem that this must be so, where the estate is voidable only. Here the estate, being for lives, was voidable only, though the condition was, in terms, that in case of breach it should be "absolutely void:" *Pennant's* case, fifth point (a), 1 *Wms. Saunders*, 287 c. note (16); and the landlord, in this case, not having re-entered, but having accepted rent after notice of the forfeiture, the same authorities shew that he has thereby not avoided but affirmed the lease.

Sir *J. Campbell*, Solicitor-General, contra. Although the freehold did not vest in the king without office found, the king was, nevertheless, entitled to the profits during *Humphrey Evans's* life. The statute, *De Prærogativâ regis*, 17 *Ed. 2. stat. 1. c. 16.*, gives the king year, day, and waste after the death of the felon, but it also gives him the profits during the felon's life; and being entitled to those, he was also entitled to enter for the purpose of taking them, and to hold possession for that purpose, to the exclusion of *Evans*. And there is no authority to shew that an inquest of office is necessary, to enable him to do this (b). Then if *Evans* had not the right of entry, he could not demise. The freehold might be in him, but the right of possession was in the crown. It is assumed on the other side, that what a man has in him he may alien: but he may have the freehold under circumstances like the present, and yet not be able to alien. In *Bullock v. Dodds* (c), *Abbott C. J.* says, "An attainted person is considered, in law, as one civiliter

(a) 3 *Rep.* 64 b.

(b) See *Staunf. Prerogative*, tit. *Corone*, 49 a, b.

(c) 2 *B. & A.* 275.

mortuus. He may acquire, but he cannot retain; he may acquire, not by reason of any capacity in himself, but, because if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the crown by its prerogative, there being no other person in whom it can vest." In *Doe dem. Evans v. Evans (a)*, where a copyholder was convicted of a capital felony, but pardoned on condition of suffering two years' imprisonment, it was held that he might maintain ejectment for the copyhold lands after the expiration of the two years, against a party who had ousted him; but it is clear, that he would not have been held entitled to bring the action during the two years.

Then as to the other points. The case contemplated by the proviso, of the tenant becoming insolvent and unable to go on with the management of the farm, had occurred. It is admitted that the goods of the party were forfeited on conviction, without office found; but, it is said, the crown did not take possession: that, however, makes no difference. If the felon, after conviction, retained possession of the goods, he did so as a wrongdoer; he could not legally have them. The passage just cited from the judgment of *Abbott C. J.*, in *Bullock v. Dodds (b)*, applies to this point. It is suggested that *Price*, as assignee of the reversion, could not take advantage of this condition; but any covenant, which touches the enjoyment or management of the land, runs with the land, and may therefore be taken advantage of by such assignee. The covenant in question, which regards the disqualification

1833.

DOE dem.
GRIFFITH
against
PITCHARD.

(a) 5 B. & C. 584.

(b) 2 B. & A. 275.

1833.

DOE dem.
GRIFFITH
against
PRITCHARD.

of the tenant to manage the land, must surely affect the land, and run with it. As to the waiver, to establish that, the rent should have been received from the lessee with an intent to waive the condition. [*Parke J.* It is found that the reversioner knew of *Evans's* conviction.] But he did not receive the rent from *Evans*, the lessee. He received it from other parties, under the notion that *Evans* was civilly dead. He acted under a mistake. [*Parke J.* The rent was received as rent due under the lease.] Receipt of rent is an affirmance of a tenancy, where it can operate by way of estoppel, as where the lord receives it from a disseisor; but an estoppel must be mutual; and there can be no mutuality where the rent is paid by parties between whom and the lessee there is no privity in estate; and who, in fact, are mere strangers, as the mother and sister of *Humphrey Evans* were in this case. [*Parke J.* Distraining for rent after forfeiture affirms the lease, and yet there is no mutual estoppel by that act. The receiving of rent, as rent, from these parties, might, in the same manner, operate as a waiver of forfeiture. *Denman C. J.* In this case, that which was paid is called "the reserved rent."] It was never received with the intention of waiving the forfeiture. *Price* did not think of interposing till the third life dropped, because he imagined that the lease had not expired till then. [*Parke J.* He knew all the facts; he only acted in ignorance of the law. *Taunton J.* In practice, as far as I have ever known it, when the landlord has once received rent with knowledge of a forfeiture incurred, it has been considered that he waived that forfeiture, whatever his secret view may have been in acting as he did. It is an acknowledgment that the lease continues, and that, in respect of it, such rent is due.] At all events

events this may be regarded as a continuing breach. It would clearly be so, if the expression in the proviso were that if the tenant should, "at any time or times" during the continuance of the lease, become insolvent, the lease should be void; and the clause must necessarily be read as if that were expressed. The insolvency here is quite sufficient: no man can be more insolvent than a convict, who cannot hold any property. [*Taunton J.* Insolvency is where a man is not in a condition to pay his debts. We do not know that this person had any.] As to the entry: it may be admitted that merely walking across the land would not be sufficient; but if the lord comes upon the land with the intent of claiming for a forfeiture, that is a good entry: and here the very act of bringing an ejectment shews that the intent was such. In *Roe dem. Tarrant v. Hellier (a)*, where the lord of a manor seized copyhold land generally and without any defined purpose, it was held to be an absolute seizure as for a forfeiture, and not quousque. There is no instance in which it has been held, that a party having entered and got possession could be defeated because he had not stated in what right he claimed.

Lloyd in reply. Nothing is claimed here on behalf of the crown but a right of entry. Why might not *Evans*, the lessor of the plaintiff, demise subject to that right? [*Taunton J.* In *Com. Dig. Capacity*, D. 6. it is said, citing *Perkins, Grants*, s. 26. that a person attainted of felony has not capacity to make a grant that shall bind the king; but a grant by a person attainted

1833.

DOE dem.
GRIFFITH
against
PRITCHARD.

(a) 3 T. R. 162.

1833.

DOE dem.
GRIFFITH
against
PARCHEARD.

binds himself and his heirs.] The same authority is referred to in 2 *Sheppard's Touchstone*, 232., already cited: and Mr. *Preston's* note does not impugn the doctrine. (a) *Bullock v. Dodds* (b) related only to the rights of an attainted felon in respect of a bill of exchange. *Doe dem. Evans v. Evans* (c) decided no more than was necessary for the purpose of that case, viz. that after pardon, the felon's right to demise his copyhold lands was restored, the lord having done nothing to divest the estate. It is said that the tenant here was insolvent because convicted of felony. If the proviso as to insolvency related merely to the pecuniary ability of *Evans* as an individual, the condition was a collateral one, and an assignee of the reversion could not take advantage of it: if it related to the capacity of carrying on the farm, (in which case alone it would run with the land,) another person might fulfil the condition on *Evans's* behalf by conducting the farm, though he himself had forfeited his goods. As to the waiver, the question is not what the intent was in receiving the rent, but whether the landlord, by doing so, in fact affirmed the existence of the lease. There is no proof that the rent was received under a mistake in law, even supposing that that would alter the effect of the receipt. It is said that the parties who paid the rent were not privy in estate to *Evans*; but they could claim no title whatever, except under him. The breach could not be a continuing one. The words of the condition are, "in case the said *Evan Griffith*, his heirs, &c. shall hereafter during the continuance of this lease happen to become insolvent." There was only one point of time when he

(a) See also *Shepp. Touchst.* p. 7. 7th ed.

(b) 2 B. & A. 358.

(c) 5 B. & C. 584.

could

could be said to *become* insolvent. That an entry, to operate as such, must be made eo intuitu, rests not on decided cases but on principle. [*Parke J.* Many examples are given in *Co. Litt.* 245. *b.* of acts of ownership which in themselves amount to an entry.] There must be something amounting to a claim as against a person adversely holding; or an act done adversely to that person. In the present case there was no act or claim that was adverse to any one, for the landlord thought the lease was determined. With respect to the supposed right of the crown to take the profits of the land during the life of the attainted party though there be no office found, if the king were entitled to the profits, he would also be entitled to the land: for, as it is said in *Co. Litt.* 4. *b.* "what is the land but the profits thereof?" and it is admitted that the king is not entitled to the land without office.

1893.

Dox dem.
GRIFFITH
against
FARMER.

DENMAN C. J. Many points have been raised in this case, and there is one upon which we entertain some doubt, and shall require time for consideration: it will not, therefore, be necessary at present to express an opinion upon all the others. As to the question of waiver, I think if there was a forfeiture incurred it was waived by the acceptance of rent. The case states that the reserved rent was regularly paid; we must take that to mean, that there was a payment of rent under the lease in question: and the landlord having accepted it with knowledge of the forfeiture, every thing was done that is requisite to waive a breach of condition. This makes it unnecessary to say whether or not the landlord, as assignee of the reversion, could avail himself

1893.

DOE dem.
GRIFFIN
against
PITCHARD.

of the breach of such a condition. Then comes the question, whether, even before office found, a person civilly dead can convey any interest in his lands which are forfeited to the crown. On this point no sufficient authority has been brought to our notice. We must take further time to consider it.

PARKE J. I think that we may dispose of all the points in this case except the second. On the first point, it has been conceded that the freehold was not divested out of *Evans* so as to entitle the crown to it, there being no office found. As to the second, the power of *Evans* to demise, I have a strong impression that he had that power, but it will be necessary to look into authorities on the subject. With respect to the forfeiture, it appears to me that, if *Evans* became insolvent at all, as to which there may be some question, his becoming so was contemporaneous with his conviction: he became insolvent by that. Then, if a forfeiture was so incurred, the next point is, whether it was afterwards waived? *Price*, the landlord and assignee of the reversion, is stated to have received the rent, with full knowledge of *Humphrey Evans's* conviction; and receipt of rent, as rent due under a lease, deliberately and with full knowledge of the facts which might create a forfeiture, is a waiver of such forfeiture, and prevents the lease from becoming void. As to the remaining point, I think any entry as owner would have been sufficient in point of law to avoid the lease (a); but the question to which the case now reduces itself is, whether an attainted person can make a valid demise.

(a) See the next case, p. 785.

TAUNTON J. I think the whole case is clear, except as to the power of demising, which is an important point, and of no small difficulty.

1893.

DOE dem.
GRIFFIN
against
PARCHARD.

PATTERSON J. I am of opinion that there was no continuing breach in this case, but that the breach and forfeiture were complete the moment *Evans* was convicted. The acceptance of rent afterwards was a waiver of the forfeiture. *Dumpor's case* (a), which was cited, is distinguishable from some of the later decisions in this respect; there the lessee had, by licence of the lessors, assigned all his interest in the demised premises, and therefore the covenant itself (not to alien without licence) was held to be waived: such an assigning was very different from underletting, or the other acts stated in the more modern cases, where it was held that the breach only was waived.

As to the remaining point,

Cur. adv. vult.

DENMAN C. J., on a subsequent day of the term (Nov. 15.), delivered the judgment of the Court.

The only point in this case upon which the Court took time to consider, was, whether an action of ejectment can be maintained upon the demise of a person attainted of felony. It is admitted that an estate of freehold, which this was, is not divested in cases of attainder until office found. Here no office has been found, and therefore the crown is not entitled.

It is laid down in *Perkins's Profitable Book*, Tit. *Grants*, s. 26., that "a man attainted of felony or

(a) 4 Rep. 119. b.

1833.

DOX dem.
GRIFFITH
against
PRITCHARD.

murder, &c. may make a grant of a rent or common, or a feoffment, &c., and the same shall bind all persons but the king (for his time), and the lord of whom the land is holden." This passage is referred to in *Comyns's Digest*, Tit. *Capacity*, D. 6. The same doctrine is laid down in *Sheppard's Touchstone*, 232.

The passage in *Co. Lit.* 42. b., which seems at first sight to be contrary, will, on examination, be found to be consistent with these authorities; for, after stating that persons attainted of felony have no ability to enfeoff, &c., he concludes, "for the feoffments, &c. of these may be avoided;" and doubtless they may by the king.

The case of *Bullock v. Dodds* (a) was pressed in argument. It is sufficient to say, as to that case, that it was an action for a chattel which had vested in the king without office found, and is therefore no authority upon this occasion. We are, therefore, of opinion that *Humphrey Evans*, the lessor of the plaintiff, was capable of granting, and that judgment must be given for the plaintiff.

Judgment for the plaintiff.

(a) 2 B. & A. 258.

1893.

DOE dem. WILLIAM JONES *against* WILLIAM
WILLIAMS.

ON the trial of this ejectment, before *Bosanquet J.*, at the Summer assizes for the county of *Cardigan*, 1893, it appeared that the lessor of the plaintiff claimed as the second son of *Griffith Jones*, under a deed of settlement, executed on the marriage of the said *Griffith*. The deed was entitled, "Articles of agreement, indented, made, covenanted, concluded, and fully agreed upon this 9th day of *January*, &c. 1770:" the parties were, *Abel Jones*, the father of *Griffith*, of the first part; the said *Griffith Jones*, of the second part; *Elizabeth Jonathan* widow, and *John* her son, (mother and brother of *Jane*, the intended wife of *Griffith Jones*,) of the third part; and the said *Jane Jonathan*, of the fourth part. The deed began as follows:—

"Whereas it is covenanted and agreed upon by and between all and every the parties to these presents, that a marriage by God's permission shall be shortly had and solemnized between the said *Griffith Jones* and the said *Jane Jonathan*; and whereas it is also covenanted and agreed upon by and between all and every the said parties to these presents, and the said *Abel Jones* and *Griffith Jones*, as well for and in consideration of

A father, seized in fee, executed a deed of settlement on the marriage of his son, containing the following clause:—

"Whereas it is agreed upon by and between the parties to these presents, that the said *A. J.* (the father) giveth and settleth upon his said son *Griffith J.* all and singular the premises, &c. from *Michaelmas* next for the term of his natural life; and from and immediately after his decease, to the use of the first son of the body of the said *Griffith J.* on the body of *J. J.* (his intended wife) to be lawfully begotten, and so on successively for all and every other

son," &c.; and in default of such issue male, the like limitation to the daughters; and for want of such issue, to the use of the settlor's right heirs: Held, that this clause was not a mere executory agreement, but operated, in law, as a covenant by the settlor to stand seised to the uses declared by the settlement; namely, to the uses of the first and other sons of *Griffith J.* successively for their respective lives.

It is a sufficient entry to avoid a fine, if the party enters expressly to claim the premises as his own: it is not necessary for him to say that he enters to avoid all fines, or to specify what particular act, adverse to his own interest, he means to defeat.

1833.

—
 Dox dem.
 JONES
 against
 WILLIAMS.

the said intended marriage, as also of the sum of 60*l*. to be advanced by the said *Elizabeth Jonathan* and *John Jonathan*, or their executors, &c. with her the said *Jane J.* as marriage portion, which said sum is to be paid within three years after the solemnization thereof, with interest," &c. (stating the mode of payment); "and whereas the said *Abel Jones* is intituled in fee of, in, and to all that messuage, house, or burgage, and part of the garden, together with the spot of ground on the liberties thereto adjoining, on the east side thereof, commonly called and known by the name of *Ty-ycha*, now in the tenure, &c. situate, &c., and all the estate, right, title, &c. of, in, and to the same, with the appurtenances: And whereas it is also covenanted and agreed upon by and between all and every the said parties to these presents, that he the said *Abel Jones*, for the support and settlement in the world of the said young couple, freely and clearly giveth and settlcth upon his said son *Griffith Jones* all and singular the above-mentioned premises, with the appurtenances, from *Michaelmas* next, for and during the term of his natural life, and from and immediately after his decease to the use and behoof of the first son of the body of the said *Griffith Jones*, on the body of her the said *Jane Jonathan* lawfully begotten or to be begotten, and so on successively for all and every other son and sons, the elder to take before the younger; and in default of such issue male, to the use," &c. (the like limitation to the daughters, successively); "and if in case more than one child shall happen to be born therefore the younger children, if more than one, are to be provided for according to their father's discretion: and for want of such issue, to the use and behoof of his own right heirs

for

for ever. And for the further support of the young couple, the said *Abel Jones* giveth unto the said *Griffith*, his said son, all that part of the sloop called the *Mally*, which the said *Abel* is now owner of, with all and singular mast, sail, &c. to his part belonging, or in anywise appertaining; to hold the same unto the said *Griffith Jones*, his executors, &c. for ever. And as for and concerning the messuage, &c. and garden, and all and singular the premises before mentioned, and it is hereby the true intent and meaning of these presents, and of all and every the said parties, that is to say, that if she the said *Jane* shall happen to survive her said husband *Griffith Jones*, that then and in such case a moiety of the rents and profits of all and singular *Ty-ycha* afore-said, with its appurtenances, and a moiety of the rents and profits of any other house or houses" (which should be built upon the land, as was more particularly stated in the deed), "to be received by her the said *Jane* as her jointure," &c. "Provided always, and it is hereby further covenanted and agreed," &c. — Here followed a covenant for restitution of a part of the wife's intended portion in case of her dying without issue in the course of three years after the marriage: and a like covenant for restitution of the husband's personal estate in case of his dying without issue during the same period. The deed was signed and sealed by all the parties.

The marriage took place, and *Griffith Jones* and his wife had issue, *John Jones*, their eldest son, and *William Jones*, the lessor of the plaintiff, their second son, and other children. In July 1798, the said *Griffith* and *Jane Jones*, and *John Jones*, levied a fine, with proclamations, of the above premises, which they mortgaged to one *Evan Evans*, and it was declared in and by the mortgage

1833.

DOX dem.
JONES
against
WILLIAMS

1833.

—
Doe dem.
JONES
against
WILLIAMS.

gage deed that the fine should enure to certain uses in that deed mentioned. *Evans* afterwards joined in an assignment of the premises to one *Lewis*, under whom the defendant claimed. *Griffith Jones* and his wife died some time afterwards, leaving the said *John* and *William Jones*, and other children, them surviving. *John*, the eldest son, died in *February* 1832, leaving a widow and children; whereupon *William*, the lessor of the plaintiff, as the second son, claimed the life estate limited to him by the marriage articles, alleging that that deed operated as a covenant to stand seised to uses, by virtue of which he was now entitled to the premises in question, notwithstanding the fine levied by *Griffith Jones* and *John Jones*; the estates given by the deed to the first and other sons of the marriage being merely successive life-estates, for want of words of limitation. On the part of the defendant it was contended, that the deed was merely executory as to those premises, and that the plaintiff could not claim any legal estate under it. To shew that the lessor of the plaintiff had made a sufficient entry to avoid a fine, it was proved that, in *July* 1832, he went upon the premises and demanded possession, saying that they were his property, and asked the defendant *Williams* if he would become his tenant. The learned Judge, upon this evidence, directed a verdict for the plaintiff, but reserved the points as to the operation of the deed of settlement, and as to the sufficiency of the entry.

Wilson, in this term, moved for leave to enter a non-suit upon the points reserved. First, the articles of agreement were only an executory contract, and could not give the lessor of the plaintiff a legal estate in the premises.

The

The clause referring to this property begins in the form of a recital, and points to a future time. No words of limitation are annexed to the use declared for the eldest son. It is said that the clause may be construed as a covenant to stand seised to uses; and there is, perhaps, sufficient consideration for such a covenant. But the objection to this mode of reading the instrument is, that the intention will be defeated, for if the articles be a covenant to stand seised, giving merely successive life estates to the children, and altogether passing over the issue of those children; then, supposing there should be ten children of the marriage, every one of whom should leave issue, the fee simple might, by means of the ultimate limitation to the settlor's right heirs, be totally alienated from all the descendants of the marriage, notwithstanding a part of the consideration for the articles appears to have been a sum of money received as the portion of the wife. This cannot have been the intention of the parties. But if it should be held that these are mere executory articles, not passing any legal estate, the construction of them would devolve on a court of equity, where the instrument would be considered as mere notes or heads for a more formal conveyance to be prepared under the direction of that court, and into which limitations conformable to the intention would be introduced: for courts of equity, when considering those limitations which are the immediate objects of their jurisdiction, namely, limitations which do not include or carry the legal estate, will regard the end and consideration of the settlement, and the intent of the trusts, beyond the legal operation of the words in which the articles or trusts are expressed. This is laid down in *Fearne Cont. Rem.* p. 90., and instances are there given
where

1833.

Dox dem.
 JONES
 against
 WILLIAMS.

1833.

—
Dor dem.
\ JONES
against
WILLIAMS.

where courts of equity, in dealing with executory articles, have departed from the rule in *Shelley's* case. If this Court were to decide in the manner proposed upon the articles now in question, they would exclude this jurisdiction of the courts of equity, and prevent the settlement from being carried into effect, according to the practice of those courts, so as to fulfil the settlor's intention. [*Taunton J.* Is there any instance where a contract might have operated as a covenant to stand seised to uses, and the courts of law have forbore to give it that effect, lest they should usurp the jurisdiction of the Court of Chancery?] There does not appear, in this case, any intent that the agreement should have an immediate operation. [*Taunton J.* A covenant to stand seised to uses need not.] The words are, "whereas it is agreed that *Abel Jones* giveth all and singular the premises, from *Michaelmas* next." That means, that he will so give by a settlement to be thereafter prepared. [*Denman C. J.* The agreement is, "that he giveth."] When speaking of the sloop all the words he uses are de præsentî. Supposing, however, that *William Jones's* claim was not barred, his entry was not such as could avoid the fine. "A bare entry into the lands, without more, is not sufficient. He must also, at the time of entry, declare *quo animo* he entered, that it is to avoid all fines, otherwise it will not amount to a sufficient entry to avoid a fine:" 1 *Wms. Saund.* 319. f. note (1) to *Clerke v. Pywell*, citing 13 *Vin.* 292. pl. 23. (a), MSS.; and *Ford v. Lord Grey* (b).

Cur. adv. vult.

(a) The case there referred to is *Berrington dem. Dormer v. Parkhurst*, 2 *Str.* 1086. 4 *Bro. P. C.* 85.

(b) 6 *Mod.* 44.

DENMAN

DENMAN C. J., on a subsequent day of the term (Nov. 15.), delivered the judgment of the Court. After referring to the marriage articles above stated, his Lordship said,—There does not appear in the deed any agreement to make a further settlement at a subsequent time; we therefore think that the contract on the part of *Abel Jones* must be construed as a covenant to stand seised to the uses declared in that settlement. As to the entry, the point is like one which has been decided in the last case (a); and we think the rule of law is, that if a party enters expressly to claim the premises as his own, it is not necessary for him to say what particular act, adverse to his interest, he means to defeat. There will, therefore, be no rule.

1833.

Doc dem.
JONES
against
WILLIAMS.

PARKE J. The note in Mr. Serjeant *Williams's Saunders*, relied upon in moving for the rule, states that the party entering must, at the time, declare quo animo he enters; that it is to avoid all fines; but the authorities cited for that proposition do not support it.

Rule refused.

(a) *Doc dem. Griffith v. Pritchard*, ante, p. 765.

TURNER *against* ROBINSON and Another.

ASSUMPSIT for work and labour. At the trial before Denman C. J., at the *London* sittings after *Trinity* term 1833, the following facts appeared. The wages at the rate of 80*l.* per annum: Held, that the *prima facie* presumption was, that the hiring was for a year; and that having been rightfully dismissed for misconduct before the year expired, he could not recover wages pro rata. And this, although the master had brought an action against him for the misconduct, and recovered damages.

In an action by a servant, who was dismissed, for wages, the proof was, that he was to have

defend-

1833.

 TURNER
 against
 ROBINSON.

defendants were silk manufacturers; the plaintiff acted as their foreman from *January* to *June* 1831, and sought to recover in this action a remuneration for his services during that period. The evidence as to the amount of wages was, that it had been agreed between the plaintiff and defendants, that the plaintiff was to have wages at the rate of 80*l.* per year. In *June* 1831 the plaintiff was dismissed by the defendants, for having advised and assisted their apprentice to quit their service and go to *America*, and for that, the defendants had brought an action against the plaintiff, and recovered 40*s.* damages. It was contended for the defendants, that it must be taken on this evidence, that the plaintiff had been hired for a year, and having been rightfully discharged from their service for misconduct during the year, was not entitled to recover wages pro ratâ, and *Spain v. Arnott* (a) was cited. The Lord Chief Justice was of opinion that there was nothing to repel the ordinary presumption, that the servant was hired for a year; and that being so, the whole wages were forfeited before the term expired, by his misconduct, whereby the defendants were prevented from having his services for the whole year. He therefore directed a nonsuit, reserving liberty to move to enter a verdict for the plaintiff.

Law in this term moved to enter a verdict. There was no proof that the plaintiff was hired for an entire year. The evidence as to that was only that he was to have wages at the rate of 80*l.* per year. Besides, here the defendants had already recovered against the plaintiff for his misconduct in enticing the apprentice from their

(a) 2 *Stark. N. P. C.* 256.

service. [*Parke J.* The *prima facie* presumption was, that the plaintiff was hired for a year; and there was nothing to rebut that presumption: and having violated his duty before the year expired, so as to prevent the defendants from having his services for the whole year, he cannot recover wages *pro rata*.]

1833.

TURNER
against
ROBINSON.

The Court (a) refused the rule.

(a) *Denman C. J., Parke, Taunton, and Patteson Js.*

PLANT *against* JAMES and Another.

TRESPASS for breaking and entering plaintiff's closes. Plea, that these closes were parcel of a certain farm, called *Woodseaves*; that *Thomas Smallwood* and *Maria* his wife, in right of the said *Maria*, and *Elizabeth Hector*, were seised each of an undivided moiety of the *Woodseaves Farm*, and also other estates, called *Park Hall* and *Park House*; and that they, by indentures of lease and release, of the 10th of *November*

Two co-heiresses being seised each of an undivided moiety of two estates, conveyed to *H.* in fee, for the purpose of making partition, one of the estates called *Parkhall*, to which they were entitled by descent as coparceners,

and another called *Woodseaves*, of which they were tenants in tail, together with all houses, outhouses, edifices, orchards, ways, paths, passages, rights, members, and appurtenances whatsoever to the said several messuages, tenements, lands, and hereditaments belonging or therewith usually held or occupied, to hold *Parkhall* to *H.* in fee to certain uses, and *Woodseaves* to *H.* in fee to the use of *H.* and his heirs, to make him tenant to the præcipe, in order to suffer a common recovery. The deed contained a covenant to levy a fine of the moiety of one of the co-heiresses in *Parkhall*, and a declaration that a recovery should be suffered of *Woodseaves*, and then declared the uses of the fine, recovery, and conveyance as to the whole of the said messuage or tenement called *Parkhall*, with the buildings, lands, hereditaments, and appurtenances thereto respectively belonging, to be to such uses as the husband of the said co-heiress should appoint; and as to *Woodseaves*, with the buildings, lands, hereditaments, and appurtenances thereunto belonging, to the use of the other co-heiress in fee. The fine was levied and the recovery suffered:

Held, that a way from the king's highway over the *Woodseaves* estate to the *Parkhall* estate, which, before the conveyance, fine, and recovery, had always been used by the occupiers of *Parkhall*, did not pass by this deed of partition, fine and recovery, to the owner of *Parkhall*.

1812,

1833.

 PLANT
 against
 JAMES.

1812, to which *Huxley* and *Spearman* were parties, conveyed to *Huxley* and his heirs and assigns, for the purpose of making partition, the two estates called *Park Hall* and *Park House*, to which *Maria* and *Elizabeth* were entitled by descent as coparceners, and the estate called *Woodseaves*, to which they were entitled under a settlement in tail general, and also an allotment under an inclosure act, together with all houses, outhouses, edifices, &c., orchards, ways, paths, passages, &c., rights, members, and appurtenances whatsoever to the said several messuages or tenements, lands, and hereditaments, lying, belonging, or in any wise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof; to hold *Park Hall* and *Park House* to *Huxley* and his heirs, to the uses thereafter expressed, and to hold *Woodseaves Farm* and the allotment to *Huxley* and his heirs, to the use of *Huxley* and his heirs, to make him tenant to the præcipe, in order to suffer a common recovery thereof. The indenture also contained a covenant by *Smallwood* with *Spearman*, to levy a fine of the moiety of *Smallwood* and his wife in *Park Hall* and *Park House*, and a declaration that a recovery should be suffered of the *Woodseaves* estates: and it then proceeded to declare the uses of the fine, recovery, and conveyance to be “as for and concerning the whole of the said messuages or tenements called *Park Hall* and *Park House*, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging, and also the whole of the allotment, with its appurtenances, to such uses as *Smallwood* should appoint; and in default of appointment, with the usual limitations in favour of *Smallwood*,

Smallwood, so as to bar dower; and as for and concerning *Woodseaves Farm*, with the buildings, lands, hereditaments, and appurtenances thereto belonging, to the use of *Elizabeth Hector*, her heirs and assigns for ever." The plea then stated the levying of the fine and suffering of the recovery; and averred that, long before and at the time of the making of the said indenture, and the levying the fine and suffering the recovery, the occupier for the time being of *Park Hall* had always been used to have and enjoy a certain way from the king's highway, over and along the said closes in which, &c. towards and into *Park Hall* and back again, for the convenient occupation of *Park Hall*, and that the said way had before and at the time of the making of the said indenture, and the levying of the said fine, and suffering of the said recovery, been always held, used, occupied, and enjoyed therewith. A title in the defendants was then deduced by the plea to the *Park Hall* estate, with the appurtenances, including this right of way, (if it passed by the said indenture, fine, and recovery,) and the defendants justified the trespasses in the exercise of such right. To this plea there was a general demurrer. The case was argued on a former day in this term by *R. V. Richards* for the plaintiff, and *Follett* for the defendants (a). The arguments urged and the several authorities cited are so fully stated and commented on in the judgment of the Court, that it is deemed unnecessary to notice them further.

Cur. adv. vult.

DENMAN C. J. in this term delivered the judgment of the Court.

(a) Before *Denman C. J.*, *Parke*, *Taunton*; and *Patteson J.*

1833.

PLANT
against
JAMES.

1833.

 PLANT
 against
 JAMES.

The sole question raised by the demurrer to the plea is, whether this right of way passed by the indenture, fine, and recovery. We are of opinion that it did not, as there are no words in this indenture capable by law of passing such an easement. Whether the parties intended to have included this way is a mere matter of conjecture, but the question in this and all other similar cases is, not what the parties intended to have done, but what is the meaning of the words they have used.

Nothing is more clear than that under the word “appurtenances,” according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass: *Grymes v. Peacock* (a), *Saundeys v. Oliff* (b), *Whalley v. Thompson* (c), *Clements v. Lambert* (d), and *Barlow v. Rhodes* (e). If the grantor wishes to revive or create such a right, he must do it by express words, or introduce the terms “therewith used and enjoyed,” in which case, easements existing in point of fact, though not existing in point of law, would be transferred to the grantee.

It is however insisted that the meaning of the word “appurtenances” may be extended, either by reference to the actual state of the subject of the grant, or to the context; and the case of *Morris v. Edgington* (g) is referred to in support of the former position. That was, as is observed by Mr. Baron Bayley (1 *Crompton and Meeson*, 449.) not a case properly requiring the construction of the words “belonging” and “appertain-

(a) 1 *Bulstr.* 17.(b) *Moore*, 467.(c) 1 *B. & P.* 371.(d) 1 *Taunt.* 205.(e) 1 *Crompt. & Meeson*, 439. 3 *Tyrwhitt*, 280.(g) 3 *Taunt.* 24.

ing,”

ing," because, if there had been no such words, the law would have implied the way in question as a way of necessity, and all that the Court determined was, that one way being necessary, and there being two, the more convenient way to the lessee passed. Some expressions are attributed to Lord Chief Justice *Mansfield* in the report, which can hardly be correct. He is stated to have said, that "as we hear of no other ways, and as it is impossible that these parties, who are supposed necessarily to understand the law, could suppose these ways were '*ways appurtenant*,' they therefore meant them, being the only subsisting ways, by the improper name of '*ways appurtenant*.'" It would have been more correct to have stated, that one of the ways would have passed as a way of necessity, and not to have made use of the absence of other ways as a ground for extending the meaning of the term "*appurtenant*;" and indeed it, would be dangerous to press the general words of a conveyance into a proof that the parties may have meant something to pass under each; for such words are generally inserted to cover any right which may possibly exist, and there are scarcely any conveyances in which all such words are satisfied. But supposing the observations of the Lord Chief Justice to be well founded, they are inapplicable to the present case, as there is no grant here of *ways appurtenant*; and if there were, it does not appear upon these pleadings but that there were ways, strictly *appurtenant*, to satisfy the grant.

The principal reliance on the part of the defendant is however placed on the other ground, viz., that the context shews that the word "*appurtenances*" is not to be construed in its strict technical sense; and that it was meant to comprise all the easements relating to

1833.

 PLANT
 against
 JAMES.

1833.

 PLANT
 against
 JAMES.

Park Hall estate, which passed to the trustee under the general words of "ways used, occupied, and enjoyed" with that estate (a); for it was contended that it never could have been in the contemplation of the parties, that any easements should be conveyed to the trustee, which were not to pass from him to the cestuy que use. The correctness of that reasoning may be admitted; but the difficulty in the way of the defendant is, that *this* right of way in the *Woodseaves* estate to the *Park Hall* estate did not, and could not, pass by these general words; for the soil itself of both estates passed; and in that part of the conveyance the general words of "all ways used, occupied, and enjoyed with the lands," could convey only ways, if any such happened to be, in other lands of the granting parties not granted to the trustee. They could not have any operation to create a right of way de novo in the very lands the freehold of which was granted by the same sentence in the deed.

It may be further observed that no definite line of road is so marked out in the deed, or ascertainable by reference to any other instrument mentioned in it, as to shew that the parties contemplated its existence before the partition, or its continuance afterwards. Even the words "therewith used" cannot, without some violence, be applied to the *Park Hall* farm and the *Woodseaves* farm separately considered, as they follow the mention of both farms, and may mean such ways as had been used by the joint owner of both in respect of his joint ownership. There is no clear statement, therefore, that the way claimed was ever de facto used, except as every

(a) To which point *Follett* cited *Kooystra v. Lucas*, 5 B. & A. 830. *Whalley v. Thompson*, 1 B. & P. 371. *Harding v. Wilson*, 2 B. & C. 96. (per *Hobroyd J.*)

owner has a right of going over every part of his own land; and even if the word "appurtenances" were susceptible of the sense contended for in this case, the intention to use it so is far from being established.

1833.

 PLANT
against
JAMES.

For these reasons we are of opinion that the way in question did not pass by the indenture, fine, and recovery, and that the plaintiff is entitled to our judgment. It may be that these instruments have not carried into effect the intention of the parties, and that there has been a mistake in the words used; but they must take the consequence of their neglect, if it be so; and it would be dangerous to unsettle the meaning of legal terms, in order to obviate a particular mischief.

Judgment for the plaintiff.

FREEMAN *against* BAKER and Another.

Tuesday,
Nov. 20th.

CASE. The first count of the declaration stated, that before and at the time of the committing of the grievance, &c. the defendants were possessed of a
An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue.

The owners of a ship circulated advertisements of sale, beginning with a description of the ship, which stated her to be copper-fastened; after which was a notice, that the hull, masts, yards, and rigging, were to be taken with all faults. Under this was printed the word "Inventory," which was followed by a list of the ship's stores and tackle; and there was then a further announcement, that the vessel and her stores were to be taken with all faults, and without allowance for weight, length, quality, quantity, or any defect whatever. The owners afterwards executed a written contract of sale, not stating the vessel to be copper-fastened, but containing this clause: "On payment of the purchase-money, the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited; but the said inventory shall be made good as to quantity only; and the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever."

Held, (assuming that the advertisement could, by words of reference, be incorporated with the contract of sale,) that the word "inventory" in the contract, referred only to the list of stores, &c. and not to the prior part of the advertisement: and, therefore, that on the two documents taken together, no warranty appeared that the ship was copper fastened.

1833.

FREEMAN
against
BAKER,

certain ship or vessel called the *Leslie Ogilby*, which was not copper-fastened, as said defendants before and at the time, &c. well knew; yet defendants, contriving, &c. to deceive and injure plaintiff in this respect, and to induce plaintiff to purchase the said ship at and for a large sum of money, heretofore, &c. falsely, fraudulently, and deceitfully represented to plaintiff that the said ship was a copper-fastened ship. The count then stated, that defendants, further contriving, &c. kept the said ship afloat in a certain dock called the *West India* dock, so that the said ship could not be inspected or examined by plaintiff, and that defendants used and employed divers other subtle arts and devices for the purpose of preventing an inspection and examination of said ship by plaintiff, and thereby defendants afterwards, to wit, &c. induced plaintiff to purchase the said ship as a copper-fastened ship, with divers stores belonging thereto, from defendants, at and for a large sum of money, to wit, 1300*l.*, and falsely, fraudulently, and deceitfully sold the said ship as a copper-fastened ship with the stores as aforesaid, to plaintiff, at and for the said sum of 1300*l.*, by means whereof the said ship became and was, and still is, of little or no use or value to plaintiff; and so the plaintiff averred, that he was then and there cheated and defrauded by said defendants of a large sum of money, to wit, 1300*l.* The second count was similar, but omitted the mention of any means used to prevent inspection. The third count stated, that plaintiff bargained with defendants, at their instance and request, to buy of them a certain other ship, with stores, &c. for the sum of 1300*l.*; and defendants, by falsely and fraudulently representing the last-mentioned ship to be copper-fastened, then and there

there sold the said last-mentioned ship, with the stores, &c. to plaintiff, for the sum, &c. whereas, in truth and in fact, the said ship, at the time, &c. was not a copper-fastened ship, which defendants well knew, by means whereof, &c. The seventh count stated, that the plaintiff bargained, &c.; and defendants, by falsely warranting the said ship to be a copper-fastened ship, sold the said ship to plaintiff for the sum, &c. whereas, in truth and in fact, the said last-mentioned ship, at the time of the said warranty and sale, was not a copper-fastened ship, but, on the contrary thereof, there were several iron through-bolts in the larboard bilge, &c. (describing the particular fastenings which were not of copper), by means whereof the ship became of little or no use, and so defendants falsely and fraudulently deceived plaintiff, &c. The eighth count was similar, but more general. Plea, not guilty.

At the trial before *Denman C.J.* at the sittings in *London* after *Hilary* term 1833, a memorandum of agreement for the sale and purchase of the vessel was put in, signed by or on behalf of the vendors and purchaser; at the foot of which memorandum (after the copy of the certificate of registry), was the following clause:—"On payment of the whole of the purchase money as aforesaid, a legal bill or bills of sale shall be made out and executed to the purchaser or purchasers, at his or their expence, and the said brig, with what belongs to her, shall be delivered according to the *Inventory* which hath been exhibited; but the said inventory shall be made good as to quantity only. And the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any de-

1833.

FREEMAN
against
BANKER.

1893.

—
FREEMAN
against
BAKER.

fect whatsoever." The memorandum itself said nothing of the vessel being copper-fastened, but the plaintiff gave in evidence together with it a printed paper, called an advertisement of sale, issued by the defendants, which began as follows:—

"For sale,—The fine brig *Leslie Ogilby*, 193 tons; *British* built; coppered and copper-fastened; shifts without ballast, takes the ground well, stows a large cargo for her tonnage, was coppered in *August* 1829, is well adapted for general purposes, and requires little more than provisions to send her to sea.—Now lying in the *West India* dock. 'Hull, masts, yards, standing and running rigging, and stores, to be taken with all faults as they now lie.'" Under this was printed,

"Inventory. — Anchors, 1 best bower; 1 small ditto," &c. &c. Here followed a list of articles, under different heads, viz. anchors, cables, sails, carpenter's stores, &c., at the foot of which was added,—“The vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, quantity, or any defects or injuries whatever. Inventories may be had on board, and further particulars known, by applying to *M^cGhie* and *Page*, sworn brokers."

The Lord Chief Justice thought that the last-mentioned paper could not be considered as incorporated with the agreement of sale, and therefore, that on the authority of *Pickering v. Dawson* (a), the plaintiff ought to be nonsuited; but he left the case to the jury, and they found (in answer to questions submitted to them by his Lordship) that the vessel was not copper-fastened; but that there was no evidence that the defendants

(a) 4 *Taunt.* 779.

knew it, and that there was no concealment on their part. A verdict was entered for the plaintiffs on the above-mentioned counts of the declaration, but leave given to move to enter a nonsuit, or a verdict for the defendants. A rule nisi having been obtained for that purpose,

1833.

FREEMAN
against
BAKER.

Sir *J. Campbell* Solicitor-General, *Comyn*, and *Amos*, now shewed cause. First, supposing the printed advertisement not to form part of the actual contract of sale, yet it was a false representation, made in order to induce the plaintiff to enter into that contract; and if that be so, then, although the jury have negatived any knowledge by the defendants that the ship was not copper-fastened, and have found that they used no concealment, there was, nevertheless, a fraud in law, which renders them liable under the first three counts; for *Polhill v. Walter* (a) shews that an action on the case for a deceitful and fraudulent representation is maintainable, where the defendant (though without any corrupt motive) has made an assertion, not knowing whether it was true or otherwise, whereby the plaintiff has been led to incur damage. [*Parke J.* In *Polhill v. Walter* (a), there was a direct assertion of that which the defendant knew to be untrue.] He merely put his name upon a bill as by procuration, which act might have been adopted afterwards by the drawee. Here the defendants have taken upon them to assert a thing, without knowing whether it were true or false. *Haycraft v. Creasy* (b) does not apply, because there the defendant acted in perfect good faith, believing all that he stated to be true. The defend-

(a) 3 B. & Ad. 114.

(b) 2 East, 92.

1893.

—
 FREEMAN
 against
 BAKER.

ants here assert what they have no reason for believing, and do it for their own advantage. In *Adamson v. Jarvis* (a), Best C. J. says, "he who affirms either *what he does not know to be true*, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages." And in *Humphrys v. Pratt* (b) the same proposition was relied upon for the defendant in error, and the judgment was there affirmed.

But, secondly, if there was in this case a positive warranty, the question of fraud becomes immaterial. Now the printed advertisement, describing the ship as copper-fastened, is introduced, by reference, into the agreement of sale, *Saunderson v. Jackson* (c); and such description amounts to a warranty that the vessel was *what* is ordinarily understood by the term "copper-fastened." The principle of *Bridge v. Wain* (d) applies; and *Shepherd v. Kain* (e) is a direct authority on the point. The undertaking in the memorandum of agreement, that "the brig, with *what* belongs to her, shall be delivered according to the inventory which hath been exhibited," refers not merely to the particulars headed "Inventory" in the printed advertisement, but to the whole contents of that paper. The word "inventory" is evidently meant to have that import, when it is said (at the end of the advertisement), that "inventories" may be had on board, and farther particulars known by applying, &c. The words, "delivered according to the inventory," are not to be confined in reference to the things belonging to the brig, which are mentioned im-

(a) 4 Bing. 78.

(c) 2 B. & P. 258.

(e) 5 B. & A. 240.

(b) 5 Bligh's Appeal Cases, 154.

(d) 1 Stark. N. P. C. 504.

mediately before. If the advertisement is at all incorporated with the agreement, every part of it must be taken into consideration. In *Kain v. Old* (a), where it was held that an instrument delivered by the vendor before the execution of the contract could not be treated as part of it, the prior instrument was void by the then existing registry act of 34 G. 3. c. 68. s. 14.: but for that objection, it does not appear that it might not have been incorporated with the contract. [*Patteson J.* Assuming that to be so, the instrument containing the words "copper-fastened" was signed by the vendor in that case; it is not so here. *Parke J.* It appears from *Shepherd v. Kain* (b), that the description and the stipulation, "to be taken with all faults," were on the same paper.] In *Pickering v. Dowson* (c), the inventory delivered previously to the contract of sale was void under the registry acts, and could not be treated as forming any part of the agreement. That objection would not arise under the present act. [*Sir James Scarlett* for the defendants. It does not appear from that case that the certificate of registry was not recited in the former instrument. *Gibbs C. J.* does not treat it as invalid.] *Pickering v. Dowson* (c) shews that the word "inventory" is well known as applying to the whole description of a vessel, and not merely to the list of stores; and the Court there looked at the entire document. That case is also distinguishable from the present, inasmuch as the inventory there was not the vendors' own, but merely one which they had received from the persons of whom they bought the ship.

1833.

 FREEMAN
 against
 BAKER.

(a) 2 B. & C. 627.

(b) 5 B. & A. 240.

(c) 4 Tunt. 779.

1853. Sir James Scarlett (with whom were Maule and Tomlinson), contra, was stopped by the Court.

FRANKMAN
against
BAKER.

DENMAN C. J. The case is now confined to a narrow point. The plaintiff's right to recover will depend upon the question, whether that which he terms the inventory was part of the contract or not. He is to make out that it was. By the memorandum of sale one party agrees to buy, and the other to sell, "the brig called the *Leslie Ogilby*, of the measurement of 193 tons, lying in the *West India* dock, for 1900*l*." And at the end of that instrument it is said, that on payment of the purchase-money a bill of sale shall be made out to the purchaser at his expense, "and the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited." The question then is, whether those words in the other paper which describe the ship as "the fine brig *Leslie Ogilby*, 193 tons, *British* built, coppered, and copper-fastened," form part of the inventory spoken of in the memorandum, when we find immediately after them the word "inventory" placed at the top of the catalogue of stores. The memorandum of sale does not refer to the other document generally as the paper known by the name of the inventory, nor is there any evidence of its being so known. The only reference is to "the inventory," and that, upon examination, proves to be the list of stores. This is rendered more clear by the clause in the contract of sale, that "the said inventory shall be made good as to quantity only;" that cannot refer to the ship itself, but must have relation to a list of articles which may be made good by supplying a deficiency in the quantity. I am therefore of opinion, without reference to the case
of

of *Pickering v. Dowson* (a), that the plaintiff cannot recover. In *Shepherd v. Kain* (b) it was not made a question, whether the advertisement of sale could be incorporated with the subsequent contract of purchase; and the decision on that point in *Kain v. Old* (c) is not applicable here.

1833.

FREEMAN
against
BAKER.

PARKE J. The question of deceit was disposed of by the jury, when they found that the defect in the ship was unknown to the defendants. *Polhill v. Walter* (d) only decides that if a person states what he knows to be untrue, and induces another to act upon it to his prejudice, a fraud in law is committed. That case was decided on the authority of *Foster v. Charles* (e), and in both, the party making the representation knew it to be false. Then as to the warranty: without saying how far any thing contained in an advertisement of this kind can at any rate be used as a contract of warranty, where a regular bill of sale has been afterwards executed, it is sufficient to observe, that the reference from the instrument of sale to the advertisement, here relied upon, is only furnished by the words, "the said brig, with what belongs to her, shall be delivered according to the inventory;" and by that word "inventory" it was intended, in my opinion, to incorporate with the instrument of sale, not the whole advertisement, but only the list of properties and stores. By the agreement, the inventory is to be made good as to quantity only; which must refer to the things enumerated in that list. If it was meant that the whole

(a) 4 Taunt. 779.

(b) 5 B. & A. 240.

(c) 2 B. & C. 627.

(d) 3 B. & Ad. 114.

(e) 6 Bing. 402. 7 Bing. 105.

advertise-

1833.

FREEMAN
against
BAKER.

advertisement should be incorporated in the agreement of sale, one important sentence is unnecessarily repeated; for it is said in the former instrument, that the hull, masts, yards, standing and running rigging and stores, are "to be taken, with all faults, as they now lie;" and the agreement states, that "the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever." This is an additional reason, though not so strong as the preceding one, for holding that the word "inventory" is not meant to include the whole matter of the advertisement, but only the enumeration of stores. The instrument itself seems to make that distinction; for the word "inventory" is printed about half way down, at the head of the list of stores. If the purchaser intended to stipulate for a copper-fastened ship, he should have had that description inserted in the particular of sale; but I doubt if the vendor intended to give such a warranty. None of the cases which have been cited bear upon this.

TAUNTON J. The precise point raised in this case was not decided in those which have been cited, turning on similar instruments. In *Shepherd v. Kain* (a) it was taken for granted that the ship was described as copper-fastened in the contract between the parties; it was only decided that the words "with all faults," did not do away with that which the Court considered a warranty. *Kain v. Old* (b), and *Pickering v. Dowson* (c) were cited by the Solicitor-General, for the purpose of

(a) 5 B. & A. 240.

(b) 2 B. & C. 627.

(c) 4 Taunt. 779.

answering

answering by anticipation any argument that might be drawn from them: his view of them may be correct, but they are not authorities in his favour: and it requires no authority to confirm the impression I entertain of this case. I think that the words in the contract of sale, "shall be delivered according to the inventory," refer only to the words immediately preceding, and mean "what belongs" to the brig; namely, the rigging, tackle, and other things of that kind, and not the brig herself. The inventory is, by that contract, "to be made good as to quantity only:" the argument for the plaintiff is, in effect, that something contained in the inventory should be made good as to quality. The words of the advertisement containing the description of the brig as copper-fastened, form no part of the inventory. The word "inventory" is placed after that description, at the head of a distinct list of articles. If it had been at the head of the paper, it might have been contended that the whole was the inventory. I am of opinion, therefore, that this description of the vessel cannot be imported into the contract as a warranty, and that the plaintiff is not entitled to recover.

PATTESON J. As to the first question raised, the decision in *Polhill v. Walter* (a) is put distinctly and pointedly on the ground that the party knew the representation he made to be false; and Lord *Tenterden* particularly guards against any other construction, by saying,—“If the defendant had had good reason to believe his representation to be true, he would have incurred no liability; for he would have made no state-

1833.

 FREEMAN
 against
 BAKER.

(a) 5 B. & Ad. 114.

1833.

FREEMAN
against
BAKER.

ment which he knew to be false;—a case very different from the present.” With respect to the other point, I feel great difficulty in attributing to words a sense which they do not ordinarily bear, for the purpose of a particular case; and, here, the word “inventory” is used in the ordinary sense in the document which the plaintiff seeks to incorporate with the contract of sale. Then we are asked to put a different construction upon it, where it occurs in the contract itself. I think that cannot be done, for the reasons which have been already given; and especially for this,—that the defect which the plaintiff claims to have made good is a defect of quality, and not of quantity, for which, alone, the contract of sale provides.

Rule absolute.

Tuesday,
November 20th.

PRATT against VIZARD, Gent., One, &c., and
BLOWER, Gent., One, &c.

A. wishing to borrow money on a mortgage of land, delivered the title-deeds to *B.*, the intended mortgagee, for examination, and said that he would pay all expenses. *B.* handed the deeds to his own attorneys to be investigated. The negotiation went off, and the attorneys being requested by *A.* to return his deeds, refused to do so till he paid their bill of costs. On assumption brought by *A.* against the attorneys, to recover back the money so paid:

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Denman C. J., at the sittings at *Guildhall* after *Hilary* term 1833, the material facts appeared to be as follows:—In *July*

Held, that the defendants could not be considered as having acted for both parties in the negotiation, and, therefore, had not a lien against *A.* as his attorneys: That supposing *A.* liable to *B.* for the costs incurred, *B.* could not communicate to his own attorneys a lien upon *A.*'s deeds, by handing them to the attorneys for investigation: That the undertaking of *A.* to *B.*, if it amounted to a promise to pay these costs, did not entitle *B.*'s attorneys to detain the deeds, as it established no privity between them and *A.*: And that *A.* might have brought trover for the deeds, and was entitled to recover in this action.

1829,

1829, the plaintiff, wishing to raise money by mortgage of an estate, applied for that purpose to Messrs. *Rowley* and *Mansell*, who were possessed of 4000*l.* stock, as trustees under a will. The title-deeds of the estate were sent by the plaintiff to *Rowley* to be inspected with a view to the advance; and the plaintiff, in a letter written about that time to *Rowley*, said (referring to the deeds so sent), "I shall pay with pleasure all expenses attending the same." *Rowley* handed the deeds to the defendants, his solicitors, to be examined. The plaintiff had several communications with the defendants in the course of the negotiation, but did not employ any solicitor on his own behalf till *November* 1829, when the defendant *Blower* sent him drafts of a mortgage deed and declaration of trust: the plaintiff then submitted these to Mr. *Davison*, his own attorney. It was afterwards found that *Mansell* had not been regularly appointed trustee, and the negotiation was consequently broken off; but Mr. *Blower* refused to deliver up the deeds to the plaintiff until he should pay the defendants' charges in respect of the business done; alleging that the defendants had received the deeds as attornies for both parties, and had a lien upon them for the bill of costs. The plaintiff paid the bill under protest, and brought this action for the amount. The Lord Chief Justice directed a nonsuit, giving leave to move to enter a verdict for the plaintiff. The points reserved were, first, whether the plaintiff was entitled to refuse execution of the mortgage deed; and, secondly, whether the defendants had a right to withhold the deeds till the plaintiff paid their bill. The case ultimately turned on the latter point only. A rule nisi having been obtained in pursuance of the leave reserved,

1833.

 PRATT
 against
 VISEARD.

1833.

 PRATT
 against
 VESARD.

Sir *James Scarlett* and *R. V. Richards* now shewed cause. First, the defendants had a lien; or, at any rate, they are entitled to retain the money which the plaintiff paid them to redeem the deeds. The attorney who negotiates a mortgage, though nominated by the mortgagee, is, in fact, the attorney of the mortgagor also. Or, supposing this not to be so, the plaintiff here, wishing to raise money on mortgage, sent his deeds to *Rowley*, to be put into the hands of his attorneys for an investigation of the title; then the attorneys, as against *Rowley*, had a lien on the deeds: and admitting that the plaintiff might have brought trover against them on their detaining the deeds from him; yet if he, upon hearing of the circumstances, went to them and paid their bill of costs, he cannot now recover back money so paid, on an account for which he was liable in foro conscientiae. The deeds had come to the hands of the defendants by the plaintiff's consent; he had, in fact, employed them, and he was bound to pay some one. If he did not pay the defendants in respect of a lien which they had, he paid them on *Rowley's* account, and as his agents. [*Parke J.* He did not acknowledge, when he paid the bill, that it was a debt due from him to any one.] Secondly, the plaintiff, by his letter, had expressly agreed to pay the expense of investigating his title; and the benefit which he was to derive from the enquiry was a consideration for that promise.

Platt, contra. The money was extorted, and paid under protest; unless, therefore, the defendants had a lien, the plaintiff must recover; and the defendants must seek payment of their bill of costs from *Rowley*, their employer. It is not correct to say that the mortgagee's

gagee's attorney is also attorney for the mortgagor: the practice is, that each employs his own. The deeds here were handed by the plaintiff to *Rowley*, and not to the defendants. In *Hollis v. Claridge* (a), the plaintiff, wishing to raise money, gave some title-deeds, which he proposed as a security, to be inspected by the person who was to make the advance; the latter handed them to his conveyancer; and the conveyancer, on the negotiation going off, claimed a lien upon the deeds as against the plaintiff, for his bill of costs. But the Court of Common Pleas held that the conveyancer had no better title to retain them than the party from whom he received them, and was therefore liable in trover for the deeds at the suit of the plaintiff. Here, as was argued in that case, the defendants' possession of the deeds was the possession of their client; he could not have a lien, and, consequently, they could have none. If the plaintiff had refused to pay the bill of costs, *Rowley*, and not the defendants, must have attempted to recover against him for the amount. There was no contract between the plaintiff and defendants.

1838.

 PRATT
 against
 VILARD.

DENMAN C. J. I am of opinion that this rule must be absolute. Whether or not the defendants in this case had a lien on the title-deeds, depends upon the question, whether or not the plaintiff employed the defendants to do his work in respect of those deeds. Now the evidence shews that he did not. Their employment was for the intended mortgagee, and rather against than for the mortgagor. And although there was a letter in which the mortgagor expressed himself willing to pay

(a) 4 Tinn. 807.

1833.

 PRATT
 against
 VIZARD.

the expenses, that was addressed to the adverse party, and does not establish any privity between the mortgagor and the attornies of the mortgagee. The whole question is, whether there was a particular agreement entered into by the plaintiff, giving the defendants a lien upon his deeds, or whether they are, at all events, to be considered as his attornies in the transaction. I think there was no such agreement, and that the defendants had no lien against the plaintiff as his attornies.

PARKE J. The plaintiff, having been obliged to pay this money and, having done so under protest, may recover it back if he might have recovered back the deeds in an action of trover without paying the bill of costs. It is clear from *Hollis v. Claridge* (a) that *Rowley* could not, by transferring the deeds to the defendants, communicate a lien to them which he himself had not: nor is there any law or usage by which they themselves could have such a lien. They ought then to have shewn some special agreement for it; but there was no evidence to go to the jury as to any such agreement. If, therefore, the defendants are to be considered as the attornies of *Rowley* and *Mansell*, they could have no claim upon the plaintiff for the money in question. But it is said that they were in fact attornies for both parties. Now it is true, that if the mortgage had been completed, and the money advanced, the plaintiff would have had to pay all the mortgagees' expenses; and the defendants would have stood in the place of the mortgagees for the purpose of receiving so much of those expenses as their bill amounted to; but if the negoti-

(a) 4 Taunt. 807.

ation went off by the fault of the intended mortgagees, the plaintiff was not liable to make any such payment; and in the meantime, what the defendants had to do as attornies was rather against than for the plaintiff. Can it then be said that the employment of the defendants as attornies was ambulatory, and was for one party, or both, according to the event of the negotiation? Not only were they not attornies for the plaintiff, but another person was; the defendants only looked after the interests of the proposed lender. No privity, therefore, can be established between them and the plaintiff.

1883.

 PRATT
 against
 VISEARD.

TAUNTON J. I am of opinion that the defendants had no lien on these deeds, either through *Rowley* or on their own account. The plaintiff deposited them with *Rowley*, not to be handed over to his attornies and pledged, but to be investigated by him. The simple delivery of them for that purpose did not entitle him to hand them to the defendants, nor could he communicate to them the right which they now claim. *Hollis v. Claridge* (a) is an authority on that point. Then whether the defendants could have any lien of their own, depends upon the question whether or not they were solicitors for the plaintiff. Now in the case of annuities, and I believe in that of mortgages also, the law expenses do, in practice, ultimately come out of the pocket of the borrower: but the grantee employs his own attorney; the business is done on the credit of the lender, and the action for work and labour would lie against him, and not against the borrower; though when the business is done, and the money is

(a) 4 Taunt. 807.

1833.

PRATT
against
VINARD.

handed to the borrower, the attorney takes care to come with his bill, and is paid with so much of the money borrowed, the mortgagor receiving the advance minus that amount. But there is no lien between the attorney and the mortgagor; that can only arise from one party doing something, and the other having it done for him. The defendants, therefore, in this case, are liable to refund.

PATTESON J. I am entirely of the same opinion, for the reasons which have been already given.

Rule absolute.

ROBINSON *against* DAY.

Where a new trial is granted on payment of costs, in a town cause, the costs occasioned by the cause being made a remanet are included.

A RULE was obtained in last *Trinity* term, calling on the plaintiff to shew cause why the Master should not review his taxation of costs between the above parties. The action was for slander (a): the cause was set down for trial at the sittings in *London* after *Trinity* term 1831, and was made a remanet from sittings to sittings until those after *Trinity* term 1832, when it was tried, and the plaintiff obtained a verdict. In the ensuing term, the defendant moved for a new trial upon several grounds, and partly on affidavit. A new trial was granted in *Easter* term last, on payment of costs. Upon the taxation, the Master at first disallowed the costs of making the cause a remanet, and of certain witnesses, brought up by the plaintiff at considerable expense from *Bedford*, where

(a) See *Day v. Robinson*, 1 A. & E. 554.

the cause of action arose; but on re-consideration he allowed these costs, stating that a distinction prevailed between country causes, where such costs were not allowed, and town ones, in which they were. The defendant obtained a Judge's order to pay the disputed costs into Court, to await the result of this motion. In *Trinity* term last,

1833.

 ROMNEY
 against
 DAY.

Platt shewed cause. (a) The costs were rightly allowed. At the town sittings a cause is usually made a remanet several times; and by the granting of a new trial the expenses thus occasioned will all be incurred anew. It would be hard if these costs were thrown upon the plaintiff, especially where the application for a second trial is grounded upon new matter, suggested by the unsuccessful party on affidavit. [*Littledale J.* That argument would apply in country causes.] There is no good reason that the rule should not be the same in those; but there it seldom happens that the cause is made a remanet more than once.

Kelly contra. It is desirable that the practice on this point should be settled, in order that parties may know to what they subject themselves when they consent to take a new trial on condition of paying costs. The Court of Exchequer does not allow the costs here claimed. No distinction can be shewn in principle between town and country causes, as to the payment of these costs; nor does there appear to be any established practice. The expense incurred arises merely from the inevitable delay of public business. The plaintiff, if he ultimately obtains

(a) Before *Denman C. J.*, *Littledale*, *Parks*, and *Patteson J.*s.

1838.

ROBINSON
against
DAY.

a verdict, will recover these costs as costs in the cause.

The terms used in the rule for a new trial mean that the defendant shall pay the costs of the trial merely, in which there has been a miscarriage of the jury.

Cur. ado. vult.

DENMAN C. J. in this term (*November 25th*) delivered the judgment of the Court. We are of opinion, that where a rule for a new trial is made absolute in a town cause on payment of costs, the costs occasioned by the cause being made a remanet are included. The rule, therefore, that the Master should review his taxation, must be discharged.

Rule discharged.

RULE OF COURT.

IT IS ORDERED, That where a defendant is arrested upon an alias or pluries capias issued into another county pursuant to the rule, *Michaelmas* term 3 *W.* 4. sect. 7., the defendant must put in bail in the county where he was arrested.

1838.

In the Matter of Arbitration between WESTZINTHUS and the Assignees of LAPAGE and Co.: and between ROGERS and Co. and the same Assignees.

BY rule of this Court, certain matters in dispute between *Westzinthus* and the assignees of *Lapage* and Co., and between *Rogers* and Co. and the same assignees, were referred to an arbitrator, who stated the following facts upon his award:—

In *February* 1831, *Westzinthus* shipped, at *Leghorn*, twenty-three casks of oil, by the ship *Sarah*, to *John* and *Frederick Lapage*, who then carried on business as merchants in *Liverpool* under the firm of *Lapage* and Co., in execution of an order transmitted by them to him, and at the same time drew a bill of exchange on them for the amount of the invoice of the oil. This bill, together with the bill of lading for the oil, was transmitted to certain agents of *Westzinthus*, with instructions to deliver the bill of lading to *Lapage* and Co.

W. shipped at *Leghorn* twenty-three casks of oil, on account and by the order of *L.* at *Liverpool*, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having pre-

viously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that in a court of equity, such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*

Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in case of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to the payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him.

upon

1899.

In the Matter of
WESTMINSTER
and Others.

upon their accepting the bill of exchange so drawn on them; and accordingly *Lapage* and Co. accepted the bill of exchange, and the bill of lading was delivered to them.

Messrs. *Hardman* and Co., brokers in *Liverpool*, were in the habit of making advances in cash, and by acceptances, to *Lapage* and Co. upon goods placed by them in the hands of *Hardman* and Co. for sale. Under this course of dealing, the transactions hereinafter mentioned took place. On the 14th of *March* 1891, *Hardman* and Co. were under cash advances and had accepted for *Lapage* and Co. to the amount of about 6700*l.* upon various goods, all of which were in the possession of *Hardman* and Co. On the 14th of *March* 1891, *Hardman* and Co., at the request of *Lapage* and Co., accepted their draft for 1500*l.*, falling due the 15th of *July* (which was duly paid at maturity), as a further advance upon the goods already in the hands of *Hardman* and Co., and also on the said twenty-three casks of oil by the *Sarah*, which had not then arrived: the bill of lading of the oil by the *Sarah* was, on the same 14th of *March*, duly indorsed and delivered by *Lapage* and Co. to *H.* and Co. According to the agreement, and the course of business between *Lapage* and Co. and *H.* and Co., the latter were entitled to hold all the goods and bills of lading as a security for their advances. On the 16th of *March* 1891, a similar advance was made by *H.* and Co. of 1000*l.*, on which occasion a bill of lading of certain oil, then expected by the ship *Frederick*, was handed and indorsed to *H.* and Co. by *Lapage* and Co. The facts and questions as to this oil were the same as those relating to that by the *Sarah*, and it was to abide the event of the award as to the oil by the *Sarah*.

On

On the 19th of *March* 1831, *Lapage* and Co. committed acts of bankruptcy; and their acceptance of *Westzinthus's* bill was dishonoured at maturity. On the 26th of *March*, a commission of bankrupt was issued against them. On the 24th of *March*, the *Sarah* arrived at *Liverpool*; and on the same day, the agents for *Westzinthus*, who held an indorsed part of the bill of lading, gave notice to the captain, in consequence of the failure of *Lapage* and Co., not to deliver the oil to them; and they also demanded the delivery of the oil to be made to them as agents of *M. Westzinthus* under the bill of lading held by them, and tendered the captain the amount of the freight; but no tender or offer was made to *Hardman* and Co. to repay any part of the money advanced as hereinbefore mentioned. On the 7th of *April* 1831, the solicitors of *Westzinthus* wrote the following letter to *Hardman* and Co.:—"Gentlemen, As solicitors of *M. Westzinthus* of *Leghorn*, we address you upon the subject of twenty-three casks of oil, marked T., consigned by him per the *Sarah* to Messrs. *Lapage* and Co. of your town; and of which you have illegally obtained possession, after the same had been stopped in transitu on behalf of the consignor, in consequence of the failure of *Lapage* and Co. We are informed that *Lapage* and Co. transferred to you the bill of lading of this oil, together with indigo and other property belonging to them, as a security for 1500*l.* advanced by you to them. We are also informed that you hold other property belonging to *Lapage* and Co., which you are also entitled to retain as a security for the 1500*l.* Without entering, at present, into any question as to the validity of the transfer of this bill of lading, we think it right to give you notice that, in any event, you will be required to apply the indigo and

1833.

In the Matter of
WESTZINTHUS
and Others.

1833.

In the Matter of
WESTZINTHUS
and Others.

and other property, really belonging to *Lapage* and Co. now in your possession, in payment, in the first instance, of your advances, without having recourse to the oil in question, except for any deficiency after you have realised the other securities; and should the oil be more than sufficient to cover such deficiency, *M. Westzintus* will claim the benefit of his stoppage in transitu, at least, to the extent of the surplus. If you should think it right, after this notice, to sell the oil before realising your other securities, *M. Westzintus* will hold you responsible; and in that case he will claim any balance which may arise in your hands due to *Lapage* and Co. not exceeding the proceeds of the oil; and we give you notice not to pay such balance to *Lapage* and Co., or their assignees or creditors." After the delivery of the oil had been stopped, the captain, on the 27th of *March*, delivered the oil to *Hardman* and Co. under an indemnity. At the time of the bankruptcy of *Lapage* and Co., they were indebted to *Hardman* and Co. in the sum of 9271*l.*, advanced in the manner before described; and as security for this sum, they held goods of *Lapage* and Co. which had actually arrived, of which the net proceeds, when sold as after mentioned, were 9961*l.* 1*s.* 7*d.*; they also held the bill of lading of the oil by the *Sarah*, of which the net proceeds, when sold as hereinafter mentioned, were 331*l.* 7*s.* 7*d.*; and the bill of lading of the oil by the *Frederick*, of which the net proceeds, when sold as hereinafter mentioned, were 1106*l.* 10*s.* 10*d.* After the arrival of the oil by the *Sarah* and by the *Frederick*, *H.* and Co. sold all such oil and other goods; the net proceeds of which amounted respectively to the before-mentioned sums, making a total of 11,399*l.* " Out of this sum, *H.* and Co. have paid themselves

9271*l.*

9271*l.* due to them as aforesaid; they have deposited 1437*l.* 18*s.* 5*d.* (the amount of the two parcels of oil in dispute) to abide the event of this award, and have paid over the residue to the assignees of *Lapage* and Co. The goods, other than those by the *Sarah* and *Frederick* which *H.* and Co. had sold as aforesaid, had been sold by different persons to *Lapage* and Co., and not paid for; and such vendors, at the time of the bankruptcy, were creditors of *Lapage* and Co. for the amount. The bills drawn by *Westzinthus* and by *Rogers* and Co. for the amounts of the oil by the *Sarah* and the *Frederick*, have not been paid or negotiated; but are still in the hands of the drawers or their agents."

The arbitrator was of opinion, that *Westzinthus* and *Rogers* and Co. were respectively entitled to 18*l.* 13*s.* 4½*d.* per cent. on the respective proceeds of the goods per the *Sarah* and the *Frederick* (being such part of the said proceeds as bore to the whole the same proportion which the excess of the whole proceeds of the goods sold by *H.* and Co. over the debt to them from *Lapage* and Co. bore to such whole proceeds), and ought to stand in the situation of creditors of *Lapage* and Co., for the residue of such proceeds of the goods by the *Sarah* and the *Frederick* respectively: he then awarded and directed that the sums of 61*l.* 17*s.* 8*d.* and 206*l.* 11*s.* 7*d.* (being such per centage as aforesaid), together with such sums as any dividends already declared under the bankruptcy of *Lapage* and Co. on the residue of such amounts of the said goods respectively (that is to say, on the sums of 206*l.* 10*s.* 4*d.* and 899*l.* 19*s.* 3*d.*) would amount to, should be paid to *Westzinthus* and *Rogers* and Co. respectively; and that the residue of such disputed sums should be paid to the assignees of *Lapage* and Co.; and that

1833.

In the Matter of
WESTZINTHUS
and Others.

1893.

In the Matter of
Westzinthus
and Others.

that *Westzinthus* and *Rogers* and Co. should be respectively paid such dividends as should thereafter be declared under the bankruptcy on such last-mentioned part of the sums in dispute; and that the said bills of exchange should be delivered to the assignees. But if this Court should be of opinion that *Westzinthus* and *Rogers* and Co. were entitled to the whole proceeds of the said goods respectively, then the arbitrator awarded that such proceeds should be respectively paid to them, and the said bills of exchange delivered to the said assignees; or if the Court should be of opinion that *Westzinthus* and *Rogers* and Co. were not entitled, under their stoppage in transitu, to any part of the proceeds of such goods respectively, then he awarded, that so much of the said proceeds as the dividends already declared on the whole sums for which the said goods were sold by *Westzinthus* and *Rogers* and Co. respectively to *Lapage* and Co., amounted to, should be paid to *Westzinthus* and *Rogers* and Co. respectively; and the residue thereof to the said assignees, who were to pay to *Westzinthus* and to *Rogers* and Co. such dividends as should thereafter be declared upon such whole sums respectively.

F. Pollock had obtained a rule nisi for setting aside so much of the award as gave to *Westzinthus*, and *Rogers* and Co., respectively, 18*l.* 13*s.* 4½*d.* per cent. on the amount for which the goods were sold and as directed that they should stand in the situation of creditors to *Lapage* and Co. for the residue; and the rule proposed that, instead thereof, it should be declared that *Westzinthus* and *Rogers* and Co. were entitled only to so much as the dividends already declared amounted to.

J. H. Lloyd,

J. H. Lloyd, for *Westzinthus* and *Rogers* and Co., obtained a rule for setting aside the same part of the award, and that *Westzinthus* and *Rogers* and Co. should be declared to be entitled to the whole proceeds of the goods. The Court ordered, that the case should be set down in the special paper for argument. The case was argued on former days in this term.

1853.

In the Matter of
WESTZINTHUS
and Others.

F. Pollock for the assignees of *Lapage* and Co. *Westzinthus* was not entitled to the 18l. 13s. 4½d. per cent., because at the time when his agents claimed the oil he had no right to stop in transitu, *Hardman* and Co. having then acquired an interest as indorsees of the bill of lading for value. The question is, what is the effect of the indorsement of a bill of lading for valuable consideration by the consignor. Does it reduce the goods, of which it is the symbol, into the possession of the consignee, so as to render them, if he become bankrupt, in his order and disposition within the seventy-second section of the 6 G. 4. c. 16.? Or are they to be considered in transitu till they come to the actual possession of the consignee? As to the justice of the case, it may be observed that advances had been actually made on these very goods. That is not inconsistent with the fact that the proceeds of other goods belonging to *Lapage* and Co., and deposited by them with *Hardman* and Co., produced the full sum advanced by the latter; for no man who advances money on the security of goods, advances to the extent of the full value, but only in a given proportion to that value, which varies in different trades. *Westzinthus*, the consignor of the oil, who trusted *Lapage* and Co. with the bill of lading, and thereby enabled them to obtain credit,

1833.

—
In the Matter of
WISTZINTHUS
and Others.

credit, cannot in justice be entitled to have the proceeds of the other goods applied exclusively in discharge of the debt due from *Lapage* and Co. to *Hardman* and Co., and to throw on the residue of *Lapage* and Co.'s estate in the hands of their assignees, the claim of those persons who advanced money on the credit of the consignor's goods. There is no decision applicable to the present case; but the equity is, that all the goods should bear the debt rateably. It would be a great injustice to allow the consignor to retake his goods after they had been the meritorious cause of an advance. In point of law, the consignor had no right to retake these goods; for the indorsement of the bill of lading to *Hardman* and Co. for value put an end to the right of the consignor. In *Lickbarrow v. Mason* (a), *Ashhurst J.* says, that "as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves, if not, it would enable the consignee to make the bill of lading an instrument of fraud." That observation applies here; for the bankrupts *Lapage* and Co. have obtained credit on the goods. If the consignor is entitled to have them back, then *Hardman* and Co., who had advanced money on the goods, will be defrauded; and instead of having the goods to which they trusted, will receive a dividend on the estate of *Lapage* and Co. *Buller J.*, in the opinion delivered by him in the same case in the House of Lords (b), says, "Every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and effectually as if the goods had been actually delivered into the hands of the

(a) 2 T. R. 71.

(b) 6 East, 23. note (a).

consignee."

consignee." If the indorsement of the bill of lading for value is equivalent to the delivery of goods of which it is a symbol, and operates as a transfer of property in goods, which can pass by delivery only, this case must be considered as if the goods had actually come to the possession of the consignee, and he had pledged them with *Hardman* and Co.; and if that be so, it is quite clear that the consignor could not retake them. He had no right to retake them at the time when he made the claim; for *Hardman* and Co. had not only acquired the legal property in them by the indorsement of the bill of lading, but had advanced money on them, and thereby acquired an equitable title.

At all events, they were then goods in the possession, order, and disposition of the bankrupt, with the consent of the true owner, within 6 G. 4. c. 16. s. 72. Generally speaking, the right of stopping in transitu makes an implied exception to that enactment; but still, if the goods in this case are to be considered as having ever been in the possession of the consignee subject to the consignor's right to stop them; inasmuch as that right had been divested, when *Westzinthus* made his claim, by the consignee's having indorsed the bill of lading to a third person for value; they did then remain in the order and disposition of the bankrupt, and pass to the assignees within the seventy-second section. [Parke J. Assuming that possession of the symbol of the property is equivalent to the possession of the property itself, here *Lapage* and Co. had not the order and disposition at the time of their bankruptcy, but *Hardman* and Co., and therefore the section does not apply.]

1893.

In the Matter of
Westzinthus
and Others.

1839.

In the Matter of
WESTZINTHUS
and Others.

J. H. Lloyd, for *Westzintus* and *Rogers* and Co. The award proceeded on a right principle, viz. that the unpaid vendor had an interest in the goods, subject to the right of the pledgee: but, that right being satisfied, the unpaid vendor is entitled to have all the proceeds of his goods paid over to him. The doctrine of stopping in transitu owes its origin to courts of equity, and is founded wholly on equitable principles which have been adopted by courts of law; per *Buller J.*, in *Lickbarrow v. Mason* (a), and Lord *Kenyon* in *Hodgson v. Loy* (b). It is similar to the re-vendication of the civil law. The general principle is, that if goods have got into the vendee's possession, the right of the vendor is gone; but if he can get them back before they have come into the actual possession of the vendee, he is entitled so to do; and that, because, although he may have parted with the property in them by delivering them to the vendee on board a ship or by transmitting the bills of lading, he still has an equitable lien on them for the price. *Lickbarrow v. Mason* (c) shews that the equitable title of the vendor continues, after he has transferred the legal property in the goods by indorsing a bill of lading for valuable consideration. There *Turing* and Co. had shipped goods at *Middleburg* by order of one *Freeman* of *Rotterdam*, drawn bills of exchange upon him (which he accepted) for the price, and transmitted him bills of lading. *Freeman* sent the bills of lading to *Lickbarrow* and Co. at *Liverpool*, that they might receive and sell the goods on his account, and drew bills of exchange upon them (which they accepted) for the

(a) 6 East, 27. note (a).

(b) 7 T. R. 445.

(c) 2 T. R. 63.

amount. Between the ship's departure and her arrival at *Liverpool*, *Freeman* became bankrupt, and *Turing* and Co. sent another bill of lading to *Mason* and Co. indorsed specially for delivery to them, and they thereupon obtained the goods from the master. *Turing* and Co. afterwards paid the bills drawn by them upon *Freeman*; and *Lickbarrow* and Co. paid those which had been drawn upon them by *Freeman*. There, it was held that the right of the consignors to stop in transitu was gone, though they had an equitable lien for the price, for that that could not prevail against *Lickbarrow* and Co., who had both a legal and an equitable title: a legal title as assignees of the bill of lading transmitted to *Freeman*, and an equitable title as having paid the bills drawn upon them by the latter for the amount of the goods. There, though the *jus tertii* had interposed and the vendor had enabled the vendee to confer a right upon a third person, the *equity* of the latter was considered equal only, but not superior, to that of the unpaid vendor. The question, then, in this case is whether the equity of the vendor had not attached by reason of his having asserted his claim to the goods before they were actually delivered to the consignee. Assuming that he had no legal right to the goods at the time when he demanded them, there is no authority to shew that when the lien of the assignee of the bill of lading is satisfied, the unpaid vendor's right to the goods does not revive. On the contrary, it may be collected from the opinion delivered by *Buller J.* in the House of Lords in *Lickbarrow v. Mason* (a), that if the money there advanced by the assignees of the bill of lading had been repaid, the vendor might then have retaken the goods. He

1833.

In the Matter of
WESTLINTHUS
and Others.

(a) 6 *East*, 36. note (a).

1833.

—
In the Matter of
WESTZINTHUS
and Others.

says, I am confident that if the goods in question be retained from the plaintiff *without repaying him what he has advanced* on the credit of them, it will be mischievous to the trade and commerce of this country; and it seems to me, that not only commercial interest, but plain justice and public policy forbid it. To sum up the whole in very few words, the legal property was in the plaintiff; the right of seizing in transitu is founded on equity: no case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them. The whole argument of the learned Judge here turns upon the equitable right of the assignee to have the goods, *until he is repaid for his advances.*" In the present case, every question of equity, as well as of law, was referred to the arbitrator; and, therefore, this Court must consider itself sitting as a court of equity, and is bound to decide the case on equitable principles. Now, it is quite clear that the representatives of *Lapage* and Co. would not be entitled in equity to have the goods restored to them without paying the pledgees the money for which they were pledged: *Snee v. Prescott* (a) is a direct authority upon that point, and, so far, that case has never been called in question. But the pledgees having been paid, it could not make any difference, as to their right to retain, whether *Lapage* and Co., the consignees, or *Westzintus*, the unpaid vendor, were the suitors in equity. *Hardman* and Co., who stand in the situation of pledgees in this case, could not assume a right to determine, by paying themselves out of the goods of one or the other, whether *Lapage* and Co. or *Westzin-*

(a) 1 Atk. 245. See 6 East, 28. note (a).

thus

thus should acquire the equitable right, upon their (*Hardman* and Co.'s) lien being discharged.

1833.

—
In the Matter of
WESTZINTHUS
and Others.

Then it is said that the indorsement of the bill of lading by the consignee for value, was equivalent to reducing the goods into his actual possession, and, therefore, that the transitus was at an end when *Westzintus* claimed the goods; but the reason why the right of stopping in transitu is divested by such indorsement, is not because such an act is equivalent to reducing the goods into the consignee's actual possession, but because it operates as a transfer of the *legal* property in the goods to the indorsee, and he who has advanced money on the goods has as good an *equitable* title as the unpaid vendor. If such indorsement of the bill of lading were equivalent to possession of the goods, then, if a bill of lading were deposited for a single hour with a banker who advanced money on it, and afterwards returned it on payment of the money, the consignor's right to retake the goods would be divested. [*Parke J.* There, after the lien of the banker was satisfied, the vendor would stand in the same position he was in before the deposit. If, before the deposit, he had a right to stop in transitu, he might do so after. But here, *Westzintus*, when he made his claim, had no right to resume the possession; at that time the legal right to the property as well as to the possession of the goods was in *Hardman* and Co.] The *jus tertii* might operate as a suspension of his right at that time, but as soon as the equity of the third person ceased, the right of the unpaid vendor, in respect of his claim to stop in transitu, must revive. In the case of a bill of exchange, as between the drawer and the payee, the consideration may be gone into, but it cannot between the drawer and

1833. subsequent indorsees. But if the bill comes back into

In the Matter of
WESTEINTHUS
and Others.

the hands of the payee, the equitable rights between the original parties revive. Can the right to the goods in this case depend on the fact whether the demand is made a moment sooner or later? Stoppage in transitu is the right to reclaim the goods. Suppose *Hardman* and Co. had had an interest in the bill of lading to the extent of 500*l.* and they brought trover against the captain; they could recover no more. [*Parke J.* That is by no means clear. If the transfer of the bill of lading gave to *Hardman* and Co. a legal right only to the extent of the sum for which it was pledged, they could recover that only; but it transferred the whole legal right to them. If they recover the sum advanced by them only, who is to recover the remainder? Could the consignor, who has no legal property in the goods, maintain an action for the loss of his equity of redemption? *Patteson J.* You do not say that the consignor here could have brought trover.] It is unnecessary to contend that; he clearly could not have done so without satisfying the claim of the pledgee. The question here is, not whether the vendor might maintain an action at law, but whether he has not an equitable title to these goods. Assuming that the lien of *Hardman* and Co. has been satisfied out of the proceeds of the other goods belonging to *Lapage* and Co., though they would still be holders of the bill of lading, and therefore the legal owners of the goods, still they would have no equity, and therefore could not interpose between the vendor and vendee, and prevent the former from reclaiming his goods. What *Hardman* and Co. might and ought to have done, equity would consider as done. They ought to have satisfied themselves out of the other goods.

goods. If the assignees of *Lapage* and Co. had filed a bill in equity to have the goods restored to them, they would not have been entitled to have the goods without paying the vendor; and it cannot make any difference, that here the vendor is the person who is driven into a court of equity. *Hardman* and Co., after their own debt was satisfied, were trustees of these goods for the vendor. If the right of the vendor is to be defeated by the accident of the consignee's having pledged the goods or the bill of lading, the consequence would be, that as soon as goods arrived, the consignee might, by pledging them for the smallest sum, defeat the right of the consignor. As to the argument, that to allow this stoppage in transitu would be a hardship on the general creditors of *Lapage* and Co., the answer is, that the vendor who has the equitable lien "ought not to be on a footing with the rest of the creditors for whom the assignees are trustees; for the creditors at large trusted to a personal credit, but he who has the lien never gave a personal credit, but trusted to the thing:" *Lempriere v. Pasley* (a). The question is not whether there has been an actual delivery, for that was complete as soon as the goods were shipped; but whether they ever came into the actual possession of the vendee. *Wiseman v. Vandeputt* (b) shews that an unpaid vendor may by any means prevent his goods coming into the hands of the vendee. Now here the consignor has done all that he could to prevent their coming into the hands of *Lapage* and Co.

Then, assuming (as the arbitrator has in effect decided) that *Westzinthus*, the consignor, had an equitable

1833.

In the Matter of
WESTZINTHUS
and Others.

(a) 2 T. R. 490., per *Ashhurst J.*

(b) 2 Vern. 203.

1853.

In the Matter of
WESTZINTHUS
and Others.

lien subject to the right of the pledgees, he is entitled to recover the whole proceeds of his goods, on the equitable principle that a creditor having two funds shall take to that which, paying him, will leave another fund for another creditor; and the latter has a right in equity to compel the former to resort to the other fund, or to stand in his place as to that other, if that be necessary for the satisfaction of both creditors; *Aldrich v. Cooper* (a); *Lanoy v. The Duke of Athol* (b); *Maddock's Principles and Practice of the Court of Chancery*, vol. 1. p. 250. 2d edit. No part of the goods to which *Westzintus* was equitably entitled, and which stood as a security for *Hardman* and Co.'s demand, should have been resorted to while there was another fund available; *Ex parte Goodman* (c). *Westzintus*, by means of his goods, was a surety for the debt of *Lapage* and Co.; and as such, if he had paid the whole of that debt, would have been entitled to stand in the place of *Hardman* and Co., the mortgagees of the other goods, and to be paid out of them: *Copis v. Middleton* (d).

Cur. adv. vult.

DENMAN C. J. in this term (November 25th) delivered the judgment of the Court:—

In this case *Westzintus*, who was the unpaid vendor at the time when his agents made the demand on the master of the vessel on board which the oil was, had no right to take possession on the insolvency of the vendee, *Lapage*, because the property in, and also the right to the possession of, the goods, was unquestionably vested at that time in *Hardman*, the indorsee of the bill

(a) 8 Ves. 381.

(b) 2 Atk. 444.

(c) 3 Madd. 373.

(d) Turn. & Russ. 224. 281.

of lading, for a valuable consideration. The demand, therefore, of *Westzinthus*, gave him no legal right to the property or possession of the goods; and it appears to us, that he can have no claim at law, except as arising out of the right of retaking the possession of the goods themselves, which right was determined by the indorsement of the bill of lading. It is not necessary to determine what would have been his situation, if either *Lapage* or himself had paid off *Hardman's* demand, prior to the notice given to the master, or to the actual receipt of the goods by the vendee.

But it is very properly urged, in the able argument in support of *Westzinthus's* claim, that every question of equity, as well as of law, was referred to the arbitrator, and that the unpaid vendor had, under the circumstances, an equitable title to the goods, by virtue of the attempted stoppage, subject to *Hardman's* right thereto: and also an equitable right to compel *Hardman*, the creditor, to pay himself out of *Lapage's* own property, which all the other goods (except those of Messrs. *Rogers* and Co., whose claim abides the decision of this) certainly were. The learned arbitrator appears to have decided in favour of *Westzinthus* to this extent,—that he had, by virtue of the demand or attempted stoppage in transitu, a preferable right, either at law or in equity, to the general creditors of *Lapage*; but he has allowed him only a proportion of the proceeds of his goods, thinking that all the goods deposited by *Lapage* with *Hardman* should be proportionably charged with the payment of the debt due to him. He has, therefore, deducted 81*l.* 6*s.* 7½*d.* per cent. of the proceeds of *Westzinthus's* goods, being the proportion which the debt due to *Hardman* bears to all the proceeds, and directed

1833.

In the Matter of
WESTZINTHUS
and Others.

1859.

—
In the Matter of
Westzinthus
and Others.

directed the remainder to be paid over to him; and has, therefore, disallowed the equity claimed by *Westzinthus* to oblige *Hardman* to pay himself out of *Lapage's* own goods.

We think that the arbitrator was right in allowing *Westzinthus* to be in a better condition than the other creditors, but wrong in disallowing his claim to have all the proceeds paid over to him.

As *Westzinthus* would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession by the indorsement of the bill of lading, for a valuable consideration, to *Hardman*, it appears to us that, in a court of equity, such transfer would be treated as a pledge, or mortgage, only, and *Westzinthus* would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage; in analogy to the common case of a mortgage of a real estate, which is considered as a mere security, and the mortgagor as the owner of the land. We therefore think that *Westzinthus*, by his attempted stoppage in transitu, acquired a right to the goods in equity (subject to *Hurdman's* lien thereon) as against *Lapage*, and his assignees, who are bound by the same equities that *Lapage* himself was. And this view of the case agrees with the opinion of Mr. Justice *Buller*, in his comment on the case of *Snee v. Prescott* in *Lickbarrow v. Mason* (a).

If, then, *Westzinthus* had an equitable right to the oil, subject to *Hardman's* lien thereon for his debt, he would, by means of his goods, have become a surety

(a) 6 East, 29. note.

to *Hardman* for *Lapage's* debt, and would then have a clear equity to oblige *Hardman* to have recourse against *Lapage's* own goods, deposited with him, to pay his debt in ease of the surety; and all the goods, both of *Lapage* and *Westzinthus*, having been sold, he would have a right to insist upon the proceeds of *Lapage's* goods being appropriated, in the first instance, to the payment of the debt.

The result is, that Mr. *Lloyd's* rule must be made absolute, and Mr. *Pollock's* discharged.

Rules accordingly.

1833.

In the Matter of
WESTZINTHUS
and Others.

FOREMAN and LLOYD, Executor and Executrix
of P. JEYES, against F. T. JEYES.

Wednesday,
Nov. 21st.

THIS cause was referred at nisi prius to a barrister, who made his award, directing that a verdict should be entered for the plaintiffs, but, at the same time, setting out special matter in favour of the defendant, upon which a bill was filed in Chancery against *Foreman* and *Lloyd* by the defendant, for himself and others, creditors of the testator. To this *Foreman* put in an answer, renouncing any claim under the testator's will, and stating that he had not proved it: *Lloyd* not putting in an answer, the Court of Chancery granted an injunction to restrain the present plaintiffs from taking further proceedings at law upon the award. Judgment was, however, signed in the name of the plaintiffs, and the

Plaintiffs having obtained a verdict against defendant under an award in a cause in K. B., the Court of Chancery, upon bill filed, and matter appearing on the award itself, granted an injunction to stay further proceedings. Plaintiffs nevertheless signed judgment, and took defendant in execution. On application to this Court

for a rule nisi to discharge defendant out of custody, (it being stated amongst other things, that the plaintiffs could not be met with for the purpose of attaching them by process out of Chancery), this Court refused to interfere.

defendant

1833.

FOREMAN
against
JURY.

defendant taken in execution by a ca. sa. directed to the sheriff of *Northamptonshire*, in violation of the injunction.

Miller, in this term, moved before *Littledale J.* in the bail court, for a rule to shew cause why the defendant should not be discharged out of custody. The learned Judge said that he would not venture to grant the rule, but suggested that an application should be made to the Court of Chancery; and he referred the case to the full Court, where the motion was now renewed. The affidavits stated the facts of the case at large, and that the plaintiff *Lloyd* could not be found, and her attorney refused to disclose her residence, so that an attachment from the Court of Chancery would be ineffectual; and it was made part of the motion, that service of the rule on the plaintiffs' attorney might, under the circumstances, be good service. In support of the application, *Davis v. Salter (a)* was cited, where the defendants, executors, were restrained by injunction from disposing of any of the testator's property, and an action being brought against them, as executors, in the Court of Exchequer, it was moved in that Court that the proceedings might be stayed; upon which *Bayley B.* observed that the injunction was no ground for staying the proceedings, but might be for staying execution if the plaintiffs obtained a verdict.

DENMAN C. J. It would be going very far to stay the enforcement of legal rights on such a ground as this; and I think we ought not to begin the practice. The case cited does not apply. There must be no rule.

(a) 2 Cro. & J. 466.

PARKE J. We can only look to the legal rights of the parties; and the plaintiffs, having obtained a verdict by the award, have a legal right to proceed upon the judgment.

1833.

FOREMAN
against
JURY.

TAUNTON and PATTESON Js. concurred.

Rule refused (a).

(e) The Court of Chancery was afterwards applied to, and Lord Brougham, Chancellor, ordered that the defendant should be discharged.

CHEETHAM and Wife *against* BUTLER.

ASSUMPSIT on a promissory note given to the plaintiff's wife before marriage. Plea, general issue. At the trial before *Denman* C. J., at the *Lincolnshire* Spring assizes, 1833, the following note, written upon a stamp of 3s. 6d., was given in evidence:—"I promise to pay to *Mary Meager* the sum of one hundred pounds for value received." It was objected that the note was within the first class of promissory notes mentioned in 55 G. 3. c. 184. sched. part 1., viz. a note payable to the bearer on demand and re-issuable, and therefore required a stamp of 8s. 6d., and *Keates v. Whieldon* (a) was cited. The Lord Chief Justice thought that the note was one within the second class of cases mentioned in sched. part 1., viz. notes payable in any other manner than to bearer on demand, but not exceeding two months after date, or sixty days after sight, (not re-issuable,) and therefore that the stamp of 3s. 6d.

A promissory note payable to *A. B.* generally, is not one payable to bearer on demand, and re-issuable, within the first class of notes described in 55 G. 3. c. 184. sched. part 1., but, a note payable otherwise than to bearer on demand, (not re-issuable), within class 2, and therefore such a note for 100*l.* requires a stamp of 3s. 6d. only.

(a) 8 B. & C. 7.

1838.

CHRISTIAN
against
BUTLER.

was proper; but, on the authority of the case cited, he nonsuited the plaintiff, giving leave, however, to move to enter a verdict. A rule nisi having been obtained accordingly,

Campbell, Solicitor-General, in this term shewed cause. This is a note payable to bearer on demand. Where a note is made payable generally, the words on demand are implied. In *Whitlock v. Underwood* (a), a note payable to bearer generally was held by this Court to be a note payable on demand within the first class of notes mentioned in the schedule to the stamp act. It is true that in this case, the note is in terms payable, not to bearer, but to the payee by name. But in *Keates v. Whieldon* (b), a note payable to *J. Keates* on demand was held first by *Parke J.* at nisi prius, and afterwards by this Court on an application for a new trial, to be a note payable to bearer on demand within the first class of promissory notes mentioned in the schedule to the stamp act. It is true that the Court of C. P. in *Armitage v. Berry* (c), and this Court in *Moyser v. Whitaker* (d), held that a note payable to a party or his order on demand was within the second class of notes mentioned in the 55 G. 3. c. 184. sched. part 1., viz. payable in another manner than to bearer on demand, and in the last of those cases *Parke J.* expressed some doubts as to the authority of *Keates v. Whieldon*; but that case has never been expressly over-ruled.

Sir *James Scarlett* and *Humfrey* contra. In one sense a note payable to a payee named is one payable to

(a) 2 B. & C. 157.

(c) 5 Bing. 501.

(b) 8 B. & C. 7.

(d) 9 B. & C. 409.

bearer,

bearer, for being payable to him only, he must continue the bearer; but inasmuch as such note wanting the words *bearer or order* is payable to no other person, it is not one payable to bearer in the sense intended by the legislature in the 55 G. 3. c. 184. The obvious ground for imposing a larger duty on notes falling within class 1. than those falling within class 2. is, that notes in class 1. are re-issuable. A note payable to the payee only, cannot be re-issued. Class 1. applies only to notes so framed as to entitle any one who becomes the bearer for a valuable consideration to receive the amount. Here no person but *Meager* or her personal representative could become entitled to recover the amount. [*Patteson J.* The words *and re-issuable* were not much considered in *Keates v. Whieldon (a)*.]

1833.

 CHEETHAM
against
BUTLER.

DENMAN C. J. We are all of opinion that that decision cannot be supported: and that the note in this case is one falling within class 2., and therefore has a proper stamp.

PARKE, TAUNTON, and PATTESON Js. concurred.

Rule absolute.

(a) 8 B. & C. 7.

1838.

CAMPBELL *against* RICKARDS and Others.

A merchant at *Sydney* shipped goods for *England* on board the ship *C.*, and by another ship that sailed after her, wrote to an agent in *Eng'nd*, and desired him, if he received that letter before the *C.* arrived, to wait thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days, effected an insurance through the intervention of a broker, who told the underwriters when the *C.* sailed, and when the letter ordering the insurance was written, but did not state when it was received, nor the order to wait thirty days after the receipt of it, before effecting the insurance. The *C.* never arrived. The assured brought an action on the policy against the insurers, but failed, on account of the suppression of facts by the broker. In an action by the assured against the broker, for negligence in effecting the policy; Held, that the evidence of underwriters and brokers was not admissible to shew, that in their opinion the matters not communicated were material.

CASE against the defendants as agents, for negligence in effecting a policy of insurance, by means of which negligence the plaintiff was prevented from recovering against the underwriters. Plea, general issue. At the trial before *Denman C. J.*, at the *London* sittings after *Michaelmas* term 1832, the following appeared to be the facts of the case:—

The defendants, who were merchants carrying on business in *London*, were employed by the plaintiff, who resided at *Sydney, New South Wales*, to effect an insurance on some *New Zealand* seal skins, shipped on board the *Cumberland* from *Sydney* to *England*. The instructions to insure were contained in the following letter, sent by the ship *Australia*, addressed by the plaintiff to the defendants, and dated *Sydney*, 28th of *May* 1827:—“ I will thank you to effect insurance, at market price, on forty-nine casks, containing 4175 *New Zealand* fur seal skins, shipped to the consignment of *Mr. W. Emmett* per *Cumberland*, or, in case of death, to your house, for which purpose I enclose you the bill of lading. The *Cumberland* left *Port Jackson* for *London* via *Hobart Town*, on the 27th of *April* 1827, and, by letters received from *Mr. Emmett*, was at *Hobart Town* on the 10th of *May* 1827, and was expected to sail from thence in ten or fourteen days from that date. Insur-

ance to be effected on the goods shipped to my consignment, and the freight payable at *New South Wales*. I wish the goods to be shipped by two or three opportunities, and, if practicable, by vessels coming direct to *Sydney*. To give every chance to Mr. *Emmett's* arrival in *England*, I have directed my friend Mr. *Harris* not to deliver this until thirty days after the arrival of the *Australia* in *London*; and should Mr. *Emmett* arrive after you have fulfilled these instructions, you will communicate to him what you have done, it having been mutually agreed upon, previous to his leaving *New South Wales*, that in case of any accident to him you should be appointed agent of this concern. In confirmation of which, I annex a copy of my letter to you per *Cumberland*." The foregoing letter was in a cover, on which were written the following words:—"This letter is to be delivered by Mr. *Harris* to Mr. *Emmett*, if he has arrived, and, if not, to be retained in Mr. *Harris's* possession thirty days from the date he receives it, and then to be delivered to Messrs. *Rickards, M'Intosh, and Co., London*." The *Australia* arrived in *London* on the 5th of *October* 1827, and on the 8th the letter was delivered to Mr. *Harris*, who resided in *London*. He retained the letter for thirty-six days, that is to say, until the 13th of *November* following; and no news having, up to that time, been received by him of the ship *Cumberland*, or of Mr. *Emmett*, who was coming on board of her, he (*Harris*) then delivered the letter to *Rickards, M'Intosh, and Co.*, and they then delivered it to their broker, who effected a policy. The latter told the underwriters when the *Cumberland* sailed, the date of the letter, and the place from whence it was written, but did not state to them

1838.

 CAMPBELL
 against
 RICHARDS.

1833.

CAMPBELL
against
RICKARDS.

that the letter had been in *England* thirty days, nor the order to wait thirty days after the receipt of it before effecting the insurance. The *Cumberland* never arrived, and an action was brought on the policy of insurance by *Rickards* and Co., as the agents of the plaintiff, against *Murdock*, one of the underwriters. At the trial of that cause, several underwriters were called as witnesses, who stated that, in their judgment, the matters not communicated to the underwriter were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the underwriters. A rule nisi for a new trial was afterwards granted, and cause was shewn against the rule (a); and this Court, after taking a week's time to consider of their judgment, discharged the rule for a new trial, on the ground that, even without evidence of the opinion of the underwriters, the jury would have been bound to find that the part of the letter not communicated to the underwriters was material. The plaintiff then brought the present action against the defendants for not using proper care and diligence in effecting the insurance. Several underwriters and insurance brokers were called as witnesses on the part of the plaintiff, and the letter and envelope were placed in their hands, and they were then asked whether it was material to have communicated the fact that such letter had arrived in this country thirty days before effecting the insurance. The answer was, that it was material. These witnesses also stated, that if they had been apprised of the fact, and had been asked to insure the vessel, they would have required a higher premium than that which the defend-

(a) *Rickards v. Murdock*, 10 B. & C. 527.

ants had paid. This evidence was objected to by the counsel for the defendants, as being mere matter of opinion, but was received on the authority of *Rickards v. Murdock*. The Lord Chief Justice told the jury to find for the plaintiff, if they thought, on the evidence, the defendant had been guilty of gross negligence. The jury found a verdict for the plaintiff. A rule nisi having been obtained for a new trial, on the ground, first, that the evidence of the underwriters was improperly received; and, secondly, that the defendant's omission to communicate to the underwriters the time when the letter was received, was not gross negligence, but a mere error in judgment,

1833.

 CAMPBELL
 against
 RICKARDS.

F. Pollock and Follett, in *Trinity* term 1833, shewed cause. (a) The question of negligence was for the jury. The defendants, as commercial agents, were bound to have sufficient skill, and to use due care to make a valid and effectual insurance; and the evidence of the brokers and underwriters shewed that it was well known to persons conversant with the business of insurance, that the fact concealed from the underwriters was material and ought to have been communicated. Secondly, the evidence of the underwriters was admissible. In *Berton v. Loughman* (b), where the defence was, that material information, as to the time when the ship sailed, had been withheld from the underwriter, and the letter of instructions upon which the insurance had been effected was given in evidence, *Holroyd J.* held, that a witness conversant with the subject of insurance might give his opinion as a matter of judgment, whether particular

(a) Before *Denman C. J.*, *Littledale*, *Parke*, and *Taunton J.*

(b) 2 *Stark. N. P. C.* 258.

1833.

CAMPBELL
against
RICKARDS.

facts, if disclosed, would make a difference as to the amount of the premium. The premium there had been considered as calculated upon an ordinary risk; and the question was not what the private opinion of the individual might be in the particular case, but what, in his judgment, the general opinion would be amongst those conversant with such matters. In *Rickards v. Murdock* (a), such evidence was received by Lord Tenterden at nisi prius; and a rule obtained for a new trial, on the ground that it was inadmissible, was discharged after argument. The Court must, therefore, have been of opinion that the evidence was properly received (b).

Sir James Scarlett and Maule contra. The evidence of the underwriters was not admissible. The question was not one depending on usage or science. In *Carter v. Boehm* (c), Lord Mansfield, in delivering the judgment of the Court, said that the whole Court thought that the jury ought not to pay the least regard to such evidence,—that it was mere opinion, not evidence. So in *Durrell v. Bederley* (d), Lord Chief Justice Gibbs, at nisi prius, said, that the opinion of underwriters as to the materiality of facts, and the effect they would have had on the premium, was not admissible in evidence. Secondly, the defendants were not guilty of gross negligence. Before the decision in *Rickards v. Murdock* (a), it was, at least, doubtful whether the assured were bound to communicate to the underwriters the time when the letter of instructions had arrived. This Court, after argument, thought it necessary to take a week's time to consider of their judgment. Surely a

(a) 10 B. & C. 527.

(b) See 2 Starkie on Evidence, 648, 9.

(c) 5 Burr. 1905.

(d) Holt's N. P. C. 283.

commercial agent could not be bound to know a point of law which, at that time, was so doubtful. If a special verdict had been found in *Rickards v. Murdock* (a), and this Court had given judgment for the plaintiff, and that judgment had been reversed in the House of Lords, would the defendant then have been liable? Besides, here the plaintiff was himself in fault, having given express directions that the letter should not be communicated within thirty days.

1833.

CAMPBELL
against
RICKARDS.

Cur. adv. vult.

DENMAN C. J. in this term delivered the judgment of the Court.

This action was brought by a merchant residing in *New South Wales* against his correspondent in *London* for negligence in effecting a policy of insurance, by means of which the plaintiff was prevented from recovering against the underwriters. The negligence consisted in the defendant's concealing from them, at the time of effecting the policy, a material fact within his knowledge. In *Hilary* term a rule for a new trial was obtained on various grounds. It was argued that the fact concealed was not material; and the case of *Rickards v. Murdock* (a), in which it was held to be so, was denied to be law: at any rate, as that case appears to be at variance with former decisions, it was strongly urged that a commercial man might be ignorant of such a legal point without gross negligence. The plaintiff was also said to be precluded from recovering, because he did not intend that the fact should be communicated. Lastly, some of the evidence was objected to, as re-

(a) 10 B. & C. 527.

1893.

CAMPBELL
against
RICKARDS.

ceived improperly; the opinion of brokers and underwriters having been asked, not on a matter of practice in their professions, but on one of the points on which the jury were to pronounce their verdict; *i. e.* whether the fact concealed was or was not material, and ought to have been communicated to the underwriters.

Without saying that the verdict appears in all other respects satisfactory to the Court, we are of opinion, that the rule for a new trial must be made absolute on this last ground.

Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than another. In the great case of *Carter v. Boehm (a)*, a broker, who was called as a witness for the plaintiff, stated, on cross-examination, that, in his opinion, certain letters ought to have been disclosed, and that if they had, the policy would not have been underwritten. The jury, however, found, against the witness's opinion, a verdict for the plaintiff. When his opinion was pressed, as a ground for a new trial, Lord *Mansfield*, in the name of the whole Court, declared that the jury ought not to pay the least regard to it, that it was mere opinion, and *not evidence*. The same doctrine is laid down in a case of *Durrell v. Bederly (b)* by C. J. *Gibbs*, though he received the evidence on great pressure. He said, "The opinion of underwriters on the materiality of facts, and the effect they would have had upon the premium, is

(a) 5 Burr. 1905. 1913, 1914.

(b) Holt's N. P. C. 285.

not admissible in evidence. Lord *Mansfield* and Lord *Kenyon* discountenanced this evidence of opinion, and I think it ought not to be received. It is the province of a jury and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected." In some more recent cases, such questions have certainly been proposed to witnesses: but they have passed without objection. And it may be observed, that the answers will often imply no more than scientific witnesses may properly state,—their opinion on some question of science. This is especially true of medical opinions.

In *Rickards v. Murdock* (a) indeed, out of which the present case arises, this kind of testimony was received. In giving judgment on the motion for a new trial, Lord *Tenterden* did not expressly defend its admissibility, but his words are in the alternative. "If such evidence is rejected, the Court and jury must decide the point according to their own judgment, unassisted by that of others. If they are to decide, all the Court agree in thinking that the letter was material, and ought to have been communicated, and that a jury would have been bound to come to that conclusion."

Now, this mode of disposing of the question does not appear to the Court, on reflection, to be quite correct. But we think, that as the jury are to decide on the materiality of facts, and the duty of disclosing

1833.

 CAMPBELL
 against
 RICKARDS.

(a) 10 B. & C. 527.

1833.

CAMPBELL
against
RICKARDS.

them, this verdict, founded in some degree on evidence that could not legally be received, ought to be set aside. The rule for a new trial must, therefore, be made absolute.

Rule absolute. (a)

(a) The cause was not tried a second time, but was compromised.

BROWN *against* DEAN.

A. being arrested and in custody of the sheriff at the suit of *B.*, upon a writ indorsed "oath for 76*l.*;" *C.*, in consideration of *B.* discharging *A.*, undertook to give his promissory note at six months, "for 10*s.* in the pound for the debt," on the arrival of the discharge:

Held, that this sufficiently appeared to be a promise to pay 10*s.* in the pound upon the debt for which *A.* was arrested and then in custody, and was properly declared on as such:

Held, also, that the sum indorsed on the writ was sufficient evidence of the amount for which *A.* had been arrested, and that no demand of the note was necessary to enable plaintiff to commence this action.

DECLARATION in assumpsit stated that at the time of the promise thereafter mentioned, *John Bamford* was detained in the custody of the sheriff of *Warwickshire* at the suit of the plaintiff in an action in the Court of Exchequer, for the recovery of a certain debt, to wit, a debt of 76*l.* due from *Bamford* to the plaintiff, and thereupon on the 25th of *January* 1832, in consideration that the plaintiff would give and procure the discharge of *Bamford* from such detainer and custody, defendant promised the plaintiff that he would give him his (defendant's) promissory note for 10*s.* in the pound on the said debt; that the plaintiff confiding, &c., did give and procure such discharge, and that *Bamford* was discharged accordingly, of which the defendant had notice. The declaration then averred, that the defendant was requested to deliver the promissory note, but neglected and refused to deliver or send the same or pay the amount, and that the sum of 76*l.* still remained unpaid. Plea, general issue. At the trial before *Denman* C. J. at the Spring assizes for *Warwick*, 1833, the Plaintiff proved that before and on the 26th

of

of *January* 1832, *John Bamford* was in gaol in the custody of the sheriff of *Warwickshire*, that he was committed to such custody at the suit of the plaintiff, that the latter on the 30th of *January* gave authority to the gaoler to discharge *Bamford*, and that he was thereupon discharged. The writ of *quo minus* in the action of *Brown v. Bamford* in the Exchequer, indorsed "Oath for 76*l.*," together with the sheriff's return of *cepi corpus*, was proved by the late under-sheriff's clerk. The plaintiff also put in the following letter, dated 25th *January* 1832, from defendant to plaintiff: "My daughter received a letter from you, saying, if I would give you my promissory note, at six months, for 10*s.* in the pound for the debt, and pay the costs, you would give *John Bamford* his discharge. This I will do for the sake of my unhappy daughter and her family; therefore, if you will instantly send his discharge, on the arrival of it, I hereby promise to send you the above note." No request to deliver the promissory note was proved. It was objected by the defendant's counsel that there was no evidence of any debt due from *Bamford* to the plaintiff. The Chief Justice nonsuited the plaintiff, giving leave to him to enter a verdict for 38*l.* A rule nisi having been obtained for this purpose,

Adams Serjt. and *R. Hayes* in this term shewed cause. It was necessary to prove a request by the plaintiff to the defendant to give the promissory note; for the agreement is equivalent to a promise to pay a collateral sum on request, and then an actual request ought to be made before the action is brought, according to the rule laid down in *Birks v. Trippet* (a). [*Parke* J. Where it is

1832.

BROWN
against
DEAN.(a) 1 *Saund.* 32.

1833.

 BROWN
 against
 DEAN.

part of the contract that the thing agreed for shall be done on request, it must be proved, but here the agreement by the defendant is not to give the promissory note on request, but absolutely on the arrival of *Bamford's* discharge. *Denman C. J.* By the terms of the agreement, the promise to give the note is made to depend on the arrival of *Bamford's* discharge, not on any request to be made by the plaintiff.] But, secondly, there was no evidence of any debt due from *Bamford* to the plaintiff. The declaration alleges that *Bamford* was detained in custody in an action for the recovery of a debt due from him to the plaintiff: and as that averment cannot be wholly struck out of the declaration without destroying the plaintiff's right of action, it must be proved; *Williamson v. Allison* (a), per *Lawrence J.*; *Parker v. Fenn* (b); *Webb v. Herne* (c). [*Taunton J.* The undertaking itself recognises the existence of *some* debt, which distinguishes this from cases where there was no such admission by the defendant. *Denman C. J.* That brings it to the question, what is the meaning of the words in the agreement "*the debt?*" Do they import the debt for which *Bamford* was then detained in custody, or some other debt then existing between the parties? (d)] There is no proof that the defendant promised to pay 10s. in the pound on a debt of any specific amount. There is nothing to connect the promise of the defendant with the amount of the debt indorsed on the writ. That amounts to no more than a mere statement by the plaintiff or his attorney, that the defendant owed the plaintiff that sum. Assuming that the agreement contains an admission of some debt, the amount of which is not ascer-

(a) 2 *Fast*, 452.(b) 2 *Esp. N. P. C.* 477.(c) 1 *Bos. & Pul.* 781.(d) See *Shortrede v. Cheek*, 1 *A. & E.* 57.

tained,

tained, the plaintiff can recover no more than nominal damages.

1833.

BROWN
against
DEAN.

Goulburn Serjt. and M. D. Hill contra. The true construction of this agreement is, that the defendant thereby promised to pay 10s. in the pound, not on any debt existing between the parties, but on the debt for which an action had been brought in the Exchequer, and for which *Bamford* had been arrested and was detained in custody. The defendant, by his undertaking, admits that a debt had been ascertained to be due from *Bamford* to *Brown*, for he promises *Brown* to pay 10s. in the pound on the debt and costs. The agreement, therefore, is to pay half of an ascertained sum, and that is shewn by the evidence to be 76*l*. For although the indorsement of the writ may not be evidence of any debt actually due, it is evidence of the sum for the recovery of which the plaintiff had brought his action, and in respect of which *Bamford* had been arrested and was detained in custody. That is the debt for which the defendant undertakes to give his promissory note.

DENMAN C. J. This case turns on a very special agreement contained in a letter from the defendant to the plaintiff. The letter refers to a proposal by the plaintiff, that if the defendant would give the plaintiff a note at six months for 10s. in the pound for the debt, and pay the costs, he, the plaintiff, would give *John Bamford* his discharge; and the defendant promises, that if the plaintiff will instantly send *Bamford's* discharge, on the arrival of it he, the defendant, will send the above note. At the trial it occurred to me that, as the promise was to pay 10s. in the pound on the debt, proof of a debt of some specific amount should be given;

1899.

BROWN
against
DEAN.

given; but it appears to me now that there was sufficient evidence of the contract set out in the declaration. The declaration states that *Bamford* was detained in custody at the suit of the plaintiff, in an action in the Court of Exchequer, for the recovery of a certain debt, to wit, a debt of 76*l.*; and that thereupon, in consideration that the plaintiff would procure the discharge of *Bamford* from such custody, defendant promised that he would give the plaintiff his promissory note for 10*s.* in the pound of the said debt; that is, the debt for which *Bamford* was detained in custody, and for the recovery of which the action had been brought at the suit of the plaintiff in the Exchequer. The question is, whether there is any evidence to shew what that debt was. The proof was, that the detainer was for 76*l.*; from the undertaking of the defendant referring to the detainer, it may be inferred that the parties had already ascertained the debt to be of the amount for which *Bamford* was detained in custody in the action in the Exchequer. There was, therefore, no variance, and there was evidence at the trial that the detainer was for 76*l.*, because that was the sum indorsed on the writ, and which the plaintiff swore to as the debt: for that sum *Bamford* was arrested and detained in custody. The writ and the indorsement on it (which is required by 2 *W. 4. c. 39.*) (*a*) are evidence to shew the amount for which *Bamford* had been arrested.

PARKE J. I have had considerable doubts in the course of the argument, and at one time was disposed to think there was a variance between the allegation and the proof; but on looking more narrowly into the case, I incline to think the declaration is supported by the

(*a*) See Sched. No. 4.

evidence.

evidence. The declaration states that *Bamford* was detained in custody in an action brought in the Exchequer by the plaintiff for the recovery of a certain debt, to wit, a debt of 76*l.*, due from *Bamford* to the plaintiff; that is, that an action was brought for the recovery of a debt, and that that debt was due from *Bamford* to the plaintiff. It then states that in consideration that the plaintiff would discharge *Bamford* from such detainer (that is, the detainer in the said action), the defendant promised to give him his promissory note for 10*s.* in the pound on *the said debt*; that is, the debt due from *Bamford* to *Brown* for which the action had been brought. Then, looking at the contract itself, I think the construction put on it by the counsel for the plaintiff is right, and that the promise is to pay half of an ascertained debt. There was no evidence of any dispute between the parties as to the amount: for the letter of the defendant admits the debt to be the sum for which the action was brought; the defendant does not stipulate for any further enquiry as to the amount. Then the only remaining question is, for what amount that action really was brought. Now the act, 2 *W. 4. c. 39.*, requires the amount for which a party is to be held to bail to be indorsed on the writ; the indorsement then is evidence of the amount for which the action is brought.

TAUNTON J. I entirely concur in the answer given, during the argument, to the first objection. Upon the principal question my opinion has fluctuated during the course of the argument, but I now think that the plaintiff is entitled to have a verdict entered for him. All the averments in the declaration have been proved. The declaration states that *Bamford* was detained in custody

1832.

BROWN
against
DEAN.

1893.

 BROWN
 against
 DEAN.

custody at the suit of the plaintiff, in an action in the Court of Exchequer: there is no doubt about that: "and that the action was brought for the recovery of a certain debt, to wit, a debt of 76*l.*, due from *Bamford* to the plaintiff." Looking at the terms of the defendant's undertaking, I think that, although there was no extrinsic evidence of any debt due from *Bamford* to the plaintiff, yet when the defendant says that he will give a promissory note for 10*s.* in the pound on *the* debt, and pay the costs, upon the arrival of a discharge, that is an admission that there is a debt due, and that it is of the amount for which the discharge is to be given. That the action was brought for the recovery of a certain debt due from *Bamford* to *Brown*, therefore, is perfectly clear; but the amount of that debt is said not to be proved; the proof, however, was, that the action against *Bamford* was brought for the recovery of a debt of 76*l.* The indorsement on the writ is the best evidence of that. Looking at each averment separately, I think they are proved.

PATTESON J. The principal question in this case is, whether there is a variance between the allegation and proof; and I think, upon the whole, there is not. The declaration alleges, that *Bamford* was detained in custody for a debt for which an action had been brought. By the guarantee, the defendant promises to give his note for 10*s.* in the pound for *the* debt and to pay the costs; the promise, therefore, is to give his promissory note for 10*s.* in the pound on a debt actually subsisting, for which *Bamford* had been arrested, and for which the discharge was to be given. The indorsement on the writ is good evidence to shew that the amount of the

sum

sum which the party bringing the action claimed to recover was 76*l*. It was unnecessary to prove the averment in the declaration of a request to give the note, because, by the contract between the parties, it was to be given on the arrival of the discharge. The rule for a new trial must be made absolute.

1833.

Brown
against
Dean.

Rule absolute.

The KING *against* JEFFERSON.

Thursday,
Nov. 23d.

A RULE was obtained in last *Trinity* term, calling upon *Robert Jefferson* to shew cause why an information, in the nature of a quo warranto, should not issue, requiring him to shew by what authority he claimed and exercised the office of one of the trustees for carrying into effect the several acts of parliament for regulating the harbour of *Whitehaven* in *Cumberland*. The grounds stated were, "that a majority of the persons admitted to vote at his supposed election to that office were not qualified to vote; and that it did not appear at the said election that, he, *R. J.*, had a sufficient number of legal votes to entitle him to the said office." By several acts of parliament, recited and continued by 56 *G. 3. c. xlv.*, (local and public), it is provided that, upon a certain day in every third year, from and after, &c., fourteen persons shall be chosen, nominated, and appointed by ballot by the majority of the inhabitants of the town of *Whitehaven* at the time of such election dealing by way of merchandise in goods subject to certain duties, or being master, or having not less than a sixteenth share, of any vessel then belonging to the harbour of *White-*

A quo warranto information was moved for against an officer elected by ballot, on the ground that a large proportion of the persons who voted were not qualified; but it was not shewn for whom the votes of those persons were given:

Held, that on this application the officer could not be required to prove his election valid, but it lay on the opposing parties to shew (if that were practicable) that his majority was obtained by bad votes.

haven,

1833.

The King
vs
Jefferson.

haven, which persons so elected shall (with certain others) be trustees for carrying the said several acts into execution. It was stated on affidavit in support of the rule, that, on the day of election (*August 3d*), in the year 1832, a ballot was taken for the election of such trustees, and twenty-eight persons were balloted for as candidates; that 1060 persons voted; that *Jefferson* had 578 votes (the largest number obtained by any candidate except one), and was one of the fourteen declared to be elected, and had since taken upon him the office; that the lowest number of votes for any candidate elected was 497, and the highest number for a candidate not elected, 495. One of the affidavits, made by a person who assisted in taking the ballot, stated that all persons were admitted to vote who asserted themselves to be qualified as dealers. Another affidavit stated the belief of the deponent, founded upon his knowledge of the town and inhabitants, and upon enquiries made by him, that the majority of the persons who voted for *Jefferson* were not qualified inhabitants, and were persons not dealing, or only dealing colourably, in articles subject to the duties, or were persons to whom shares in vessels had been conveyed for the purpose of the election, and who were not beneficially interested therein; and, further, that if none but qualified persons had voted, *Jefferson* would not have been elected; and that several of the candidates not elected had a majority over him of legal votes. There were also affidavits giving a list of about 600 persons who had voted as dealers qualified under the statutes, but who, it was alleged, were not so qualified, and of about thirty others, who had voted as ship-owners, to whose qualification there were also objections made. It was

not

not ascertained (except, in three or four instances, by the affidavits of the voters themselves, now put in) for whom any of the disputed votes had been given. In opposition to the rule a great number of affidavits were filed, denying the alleged incompetency of the voters, and shewing that parties wishing to dispute the qualification of voters had an opportunity of doing so as they came to ballot, and that the votes of some were in fact refused, upon objections so taken.

1838.

The King
against
Jefferson.

Sir *James Scarlett* now shewed cause. Assuming that this is an office for which a quo warranto would lie, no defect of title is shewn. Nothing is stated as to any persons who voted for Mr. *Jefferson*, but a belief that many of those who did so were not qualified. It is not said that any were objected to as they came up. The Court here called upon

Coltman (with whom was *Wightman*) contra. There must be some mode of ascertaining whether the party elected had a majority of good votes or not, and this is a proper course for bringing it in question. [*Parke J.* It has been objected in this Court before, to the taking of votes by ballot on the election of a minister by parishioners, that it made a scrutiny impracticable. (a)] Here it is sworn in support of the rule, that there were 600 bad votes; the party shewing cause must prove that he had not such a number of those bad votes as would turn the election against him. [*Denman C. J.* The bad votes may be sifted off as the voters come into the room; but when they have been admitted to ballot, how can

(a) See *Faulkner v. Elger*, 4 B. & C. 455, 457.

1833.

—
The King
against
JEFFERSON.

any scrutiny take place?] A candidate might prove that he was duly elected. Suppose, for instance, 1000 persons vote in all: it would not be possible, by merely striking out 600 as bad from the whole number given, to ascertain which candidate was duly elected; but if one could shew that, after deducting 600 from those given for him, he had still 300 good ones, it would be impossible for any other candidate to shew more than 100 good votes. There is no hardship in requiring this. If a quo warranto went, the party must prove affirmatively that he was duly elected; for that purpose he might produce the persons who voted. [*Denman C. J.* That would be against the principle of the ballot. *Taunton J.* Upon this application it is for you to impugn the title; you are not to ask the Court for a fishing information. *Parke J.* According to the mode in which you put the case, no person who had not 801 votes could prove himself duly elected.] That may be inconvenient, but a great injustice would follow if some such proof were not required. The returning officer might admit whom he pleased, and after the election there would be no means of investigating the votes. [*Taunton J.* That is the vice of the system: we are not bound to find a remedy for it. *Denman C. J.* It might be remedied by pointing out the bad votes as they came in. *Parke J.* The only remedy would be to exclude bad votes at first.]

Per Curiam(a). No *primâ facie* case is made for this application. The officer is called upon to shew title without the possibility of proving it. All the bad

(a) *Patteson J.* was in the bail court hearing motions, *Littledale J.* having gone to *Guildhall*.

votes may have been for the opposing party. The rule must be discharged.

1833.

Rule discharged, with costs.

The King
against
JEFFERSON.

GRACE PEARSON, THOMAS SPEDDING, and JAMES PEARSON, against WILLIAM PEARSON.

Friday,
Nov. 23d.

ASSUMPSIT for work and materials, for goods sold, and on the money counts. Plea, the general issue. At the York Summer assizes 1832, a verdict was taken for the plaintiffs, subject to a reference of the cause to *William Turner*, gentleman. The arbitrator made his award, in which, after stating that the plaintiffs were executrix and executors of the will of *William Pearson* deceased, he set out an agreement in writing, made, *March 7th*, 1828, between the defendant and the plaintiff *James Pearson* of the one part, and the plaintiffs *Grace Pearson* and *Thomas Spedding* (described in the said agreement as two of the executors of *W. P.*) of the other part. The agreement recited that *W. P.* deceased, by his will, left all his real and personal property to the use of the said *Grace*, his widow, during her life, and after the determination of that estate, to the use of

By a contract in writing between plaintiffs (three executors) and defendant, (testator's heir at law) after reciting an agreement of all the parties, that certain goods of the testator should be sold, and that *S.*, one of the executors and plaintiffs, should receive the proceeds for and towards payment of the testator's debts; defendant agreed, that if he took possession of the said goods, he would pay to *S.* the value thereof, or give

security for such payment, on or before, &c. One of the plaintiffs and the defendant also undertook, if the proceeds of the testator's personal property should not be sufficient for payment of the debts, to raise, and pay to *S.*, a sufficient sum to enable him to discharge them. Defendant took the goods first mentioned, but did not pay for them or give security, and afterwards, finding that they were more than he wanted, he made a verbal agreement with the plaintiffs, that he should select so much of the goods as he wished for, and take the same at the prices they had been appraised at, and that the residue should be taken and sold by the plaintiffs. He accordingly selected and took such goods, (being of a smaller value than those first bargained for,) but did not pay for them; Plaintiffs, as executors, took the residue:

Held, that supposing the action to be grounded on the written contract, *S.* was named therein merely as the agent of the plaintiffs, and therefore they need not declare specially upon the contract to pay the money to him.

Semble, per *Denman C. J.* and *Purke J.*, that the second contract might be considered as substituted for the first, and forming a new and distinct ground of action.

1833.

PEARSON
against
PEARSON.

James, his heirs and assigns for ever, subject, nevertheless, to the payment of his debts; and that there was an after-purchased estate, not mentioned in the will, to which *William Pearson*, the defendant, was entitled as heir-at-law: that in order to pay the said debts, and to make a provision for the said *Grace Pearson*, the said *William* and *James* had agreed, with the consent of *Grace Pearson* and *Thomas Spedding*, that the said *William* and *James* should sell all the household goods and other personal property in and about a certain messuage called the *Royal Oak Inn* (part of the after-purchased estate), and that the money to arise therefrom should be received by *Spedding* for and towards the payment of the said debts; and also that the said messuage, and all other real property of the testator, should be appraised and divided, and that the defendant *William* should be at liberty to take either of the lots: and after these recitals (and others respecting the provision to be made for *Grace Pearson*), the defendant *William Pearson* did for himself agree with the three plaintiffs, that in case he took possession of the messuage, household goods, &c. above mentioned, he would, upon the signing of that agreement, “pay to the said *Thomas Spedding* the full value thereof, or give a sufficient security for the payment of the same on or before the 4th of *April* then next:” and the defendant and *James Pearson* also agreed, that in case the personal property should not be sufficient to pay the testator’s debts, they, the defendant and *James Pearson*, would jointly raise and pay into *Spedding’s* hands such sum as would enable him to discharge the same. The arbitrator then found, that defendant, with the consent of the plaintiffs, took the household goods and personal property in
the

the said messuage, which were appraised at 164*l.*, and were then the property of the three plaintiffs as executrix and executors of *W. P.* deceased, but defendant never paid or gave security for the same: that defendant, after he had so taken possession, found that there were articles on the premises which he did not want, and it was therefore agreed between him and the plaintiffs, that he should select such parts of the said household goods, &c. as he wished to take, and should take the same at the prices they had been appraised at; and that the residue should be taken and sold by the plaintiffs. The arbitrator found that this latter agreement was not reduced into writing: that the defendant did accordingly select and keep goods to the value of 55*l.*, and that the plaintiffs, as executrix and executors, took the residue and caused it to be sold; that the money arising therefrom was received by the said plaintiffs, as executrix and executors as aforesaid; and that defendant never paid or secured to be paid to plaintiffs the value of the goods finally taken by him, but that he had a set-off against the plaintiffs to the amount of 30*l.* The arbitrator then set out the declaration in this cause, which contained no special count; and he directed a verdict to be entered for the plaintiffs for 25*l.*, if this Court should be of opinion that the action was properly brought by the plaintiffs as executrix and executors, and the declaration rightly framed; otherwise a nonsuit to be entered. A rule nisi having been obtained for entering a nonsuit,

1833.

 PEARSON
against
 PEARSON.

Joseph Addison now shewed cause. The contract not being executory but executed, a declaration in indebitatus assumpsit was sufficient. [*Hoggins* contrâ, being called upon by the Court, stated as his objection

1833.

PEARSON
against
PEARSON.

to the plaintiff's right to recover, that the contract relied upon was for the payment of money to *Spedding*, and not directly to the executors; and, therefore, that the declaration ought to have been special.] The contract is to pay into *Spedding's* hands, but the sale is not the less a sale by the executors. *Spedding* could not have sued on the contract. Suppose the defendant had refused to take the goods, and a stranger had bought them; the money, if paid to *Spedding*, would have been paid to him for the plaintiffs; and they would have had to sue for it if not paid. The arbitrator shews his own understanding of the transaction, by stating, as part of the second agreement, that the goods not accepted by the defendant "should be taken and sold by the plaintiffs;" and by further finding that the plaintiffs, as executors and executrix, took such residue of the goods, and caused the same to be sold, and that the proceeds were "received by the said plaintiffs as executrix and executors as aforesaid." At all events, the second contract may be separated from the first, and gives a distinct right of action; *Mayfield v. Wadsley (a)*.

Hoggins contra. The plaintiffs should have declared specially. Their right of action was upon the original written agreement, and was not divested by the verbal arrangement come to at a subsequent time. *Willoughby v. Backhouse (b)*, and *Sells v. Hoare (c)*, are analogous cases. The arbitrator himself has shewn that he could not separate the written from the verbal contract; for although he merely states, as the effect of the latter, that the defendant was to take the goods selected by him

(a) 3 B. & C. 357.

(b) 2 B. & C. 821.

(c) 1 Bing. 401.

at the prices they were appraised at, yet when he comes to mention the breach of that agreement, he says that the defendant has not paid *or secured to be paid*, the value of the goods so selected, referring to a stipulation which is found in the first contract only. Besides, the plaintiffs were not immediately and absolutely entitled to the proceeds of the goods; *Spedding* was to pay the debts out of the money raised upon the testator's personal property, and if it should not prove sufficient, the defendant, and the plaintiff *James Pearson*, were to raise a fund to be placed in *Spedding's* hands for that purpose. Now, where a plaintiff sues for the payment of money, his claim to which depends upon certain things having been performed according to a special agreement, he cannot resort to the common counts, but must declare specially; *Guy v. Gower* (a).

1833.

 PEARSON
 against
 PEARSON.

DENMAN C. J. I think the plaintiffs are entitled to a verdict. *Spedding* was one of three executors, who agreed to sell property to the defendant in a particular manner if he thought fit, and he was to pay the price to *Spedding*, to be applied in payment of the testator's debts. That is only like appointing a banker or agent to receive a sum of money: it leaves untouched the question, who are parties to the contract of sale? And even if this were doubtful, the whole of the written agreement was not carried into effect, and the ultimate purchase was only to the amount of 55*l*. Nothing is said in the last agreement of the manner in which the money is to be paid; there is a contract for buying and selling in the ordinary way, and *Spedding* is not named.

(a) 2 Marsh. 273.

1833.

PEARSON
against
PEARSON.

In either view of the case, it was unnecessary to declare specially.

PARKE J. I think the Plaintiffs have established a contract on which this action is well brought. *Spedding* must be considered merely as the agent of the executors, to perform certain duties which must otherwise have been discharged by them. A contract to pay to *Spedding* was a contract to pay them. If, indeed, he had had a particular trust, different from that of the other executors, it might perhaps have been said that the agreement to pay to him was special, and should have been specially declared upon. But he had nothing to do beyond what the executors themselves were bound to do. It also appears to me doubtful whether the subsequent transaction did not raise a new contract upon which they might sue, independently of the former one.

TAUNTON J. concurred (a).

Verdict to be entered for the plaintiffs.

(a) *Patteson J.* was in the bail court.

Monday,
Nov. 25th.

DOE dem. LANGDON *against* LANGDON.

Same *against* ROE.

In a second action of ejectment brought for the same premises, the Court will stay proceedings till the costs of the former are paid, although the former action was discontinued before consent rule or plea.

THE lessor of the plaintiff having brought two ejectments for the same premises, a rule nisi was obtained by *Cowling* before *Littledale J.* to stay the

pro-

proceedings in the second action until the costs of the former were paid, on grounds which are immaterial, not having been mentioned on shewing cause. His Lordship directed the case to be argued before the whole Court.

1833.

—
Dor dem.
LANGDON
against
LANGDON.

Barstow now opposed the rule, on the ground that, in the former action, the plaintiff had not proceeded as far as consent-rule or plea, and that the Court ought not in such a case to stay proceedings, unless on special circumstances.

Cowling, in support of the rule, contended, that wherever vexatious or improper conduct appeared in the proceedings of the lessor of the plaintiff, the Court would stay them, even though no trial had been had; and that the fact of the lessor of the plaintiff having dropped the former action before he had entered into a consent-rule was proof of vexation, since, until that step had been taken, he was not liable for costs; and he cited *Smith dem. Ginger v. Barnardeston (a)*, where it had been so held by *De Grey* C. J., after consulting the Judges of the other Courts. [*Barstow*. There the plaintiff had previously brought two actions, here only one.]

The Court (b), however, stopped *Cowling*, saying, that he had shewn sufficient cause; and made the

Rule absolute.

(a) 2 *W. Bla.* 904.

(b) *Denman* C. J., *Parke*, *Taunton*, and *Patterson* J.

1833.

HILL
against
The

MANCHESTER
and SALFORD
Water Works
Company.

when the resolution to affix the seal to his bond was passed; but that the number then attending was less than that required by law, could only be proved by inspection of the book, which was not written in the plaintiff's presence, but made afterwards, from rough memoranda, by the clerk.

In a former trial between the same parties before Lord *Tenterden*, a deed of composition between the company and several persons having claims upon them, including the plaintiff, had been given in evidence, to prove an express recognition of that bond under the seal of the company. The bond was then held by Lord *Tenterden* to be set up by that acknowledgment, even though informal or irregular in its origin, and a rule for a new trial, founded on an objection to that ruling was refused by the Court. The same evidence was received on the trial of this case, and its effect has been much questioned in the late argument before us. But it is not necessary that we should deliver any opinion on that subject, as we are clearly of opinion that the books of the company are not admissible in evidence for the purpose of establishing the facts therein mentioned against the plaintiff suing the body corporate. The consequence is, that the rule for a new trial must be discharged.

Rule discharged.

1833.

FINNIE *against* MONTAGUE.Monday,
Nov. 25th.

KNOWLES moved for an order upon the signer of the writs for K. B. directing him to sign a pluries bill of *Middlesex*. This action had been commenced before the Uniformity of Process Act, 2 *W.* 4. c. 39. came into operation, and had been regularly continued by alias and pluries bills of *Middlesex*. Those writs had hitherto been signed by the officer appointed to sign bills of *Middlesex*. The Uniformity of Process Act, however, having now abolished the proceeding by bill of *Middlesex*, the office for signing bills of *Middlesex* had as a consequence been also abolished, and all King's Bench writs are now signed by the same officer. An application had been made to that officer to sign a pluries bill of *Middlesex*, which it was necessary to issue to continue the present action; but he had refused, on the ground that his official seal would not apply to a bill of *Middlesex*, but only to writs issued in the new form. The consequence was, that the plaintiff could not continue his action, and, as a new action would now be barred by the statute of limitations, he would be entirely without remedy.

After the Uniformity of Process Act, 2 *W.* 4. c. 39., the Court directed the signer of K. B. writs to sign a pluries bill of *Middlesex*, in a suit commenced before the act, and which, if recommended, would have been barred by the statute of limitations.

Per Curiam. It is reasonable that the plaintiff should be enabled to continue his action; and as all writs are now signed at the same office, we think the signer ought to sign this writ.

Rule granted (a).

(a) This Court had given a like direction in *Storr v. Bowler*, 4 *B. & Ad.* 112.

1833.

DOE dem. T. STANDISH and W. BLACKBURN
against ROE.

A. having brought an ejectment, had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtor's Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the Court stayed the proceedings in it until the costs of the first were paid.

10 inst. 761.

A RULE nisi had been obtained to stay the proceedings in this cause until payment of the costs of two former ejectments on the demise of *T. Standish*, brought to recover possession of lands in the county of *Lancaster*, formerly the property of Sir *F. H. Standish*, and then enjoyed by *F. H. Standish*, Esq., who defended as landlord. One of the causes was set down for trial at the *Lancaster* Summer assizes 1818, when the plaintiff withdrew the record. In the following term, the defendant obtained a rule for judgment as in case of a nonsuit, which was discharged on the lessor of the plaintiff undertaking to try the cause at the next assizes. The cause was again entered, and the record again withdrawn. The defendant's taxed costs amounted to 430*l*. In *January* 1831 the lessor of the plaintiff, *Thomas Standish*, was discharged under the insolvent debtors' act. The costs in the above ejectments were inserted in his schedule, and *William Blackburn* was appointed assignee of his estate. This action was brought upon the demises of the insolvent and assignee. The affidavits in support of the rule stated, that *Thomas Standish's* discharge under the insolvent act, and the appointment of *Blackburn* as assignee, had been fraudulently concerted in order to bring an ejectment without paying the costs of the former ejectments; but that was denied in the affidavits on the other side. In *Easter* term last

J. Williams

J. Williams and *Tomlinson* shewed cause (a). The Court will, undoubtedly, in an ordinary case, stay the proceedings in a second ejectment until the costs of the first are paid; but that rule does not apply to a case like the present, where the second ejectment is brought by the assignee of the estate of an insolvent debtor, the first having been brought by the insolvent himself. In *Doe dem. Chambers v. Law* (b), the second ejectment was brought by the assignee of the insolvent debtor, and the first by the insolvent himself, and the Court stayed the proceedings, only because the assignment was a mere contrivance to defraud the defendant. Here all fraud is negatived. The title of the assignee accrued after the first ejectment was determined by the judgment of nonsuit. *T. Standish*, on whose demise the first ejectment was brought, is not liable now to be sued at law for the costs incurred. They are inserted in his schedule. The first ejectment was brought by *T. Standish* for his own benefit; the second by his assignee for the benefit of the creditors. Not only the parties bringing the two ejectments, but the parties interested in the result, are different.

1833.

DOE dem.
STANDISH
against
ROE.

Wightman contra. The general rule is quite clear, that the Court will stay the proceedings in a second ejectment until the costs of the former are paid, provided both be brought to try the same title, *Keen dem. Angel v. Angel* (c), *Doe dem. Cotterell v. Roe* (d); and this rule has been held to apply to a case where the first ejectment was brought by the father of the lessor of

(a) Before Denman C. J., Littleale, Parke, and Patteson Js.

(b) 2 Str. W. Bl. 180. (c) 6 T. R. 740. (d) 1 Chitty's Rep. 195.

1833.

HILL
against
The
MANCHESTER
and SALFORD
Water Works
Company.

applied on such occasions only as the company of proprietors at any general or special general assembly, or the court of directors for the time being, should order and direct. It appeared further, that the bonds in question were in fact issued in pursuance of a resolution of a special general assembly of the proprietors convened in pursuance of notice, to take into consideration the general state of the company, and other special matters, on the 5th of *December* 1814; that it was adjourned to a following day, and from time to time to the 7th of *April* 1815; that at several of the adjourned meetings there were not ten proprietors present, *nor was that number present at the meeting of the 7th of April* 1815, when it was resolved to issue these bonds, nor at another meeting on the 17th of *April* 1815, when it was resolved to execute the deed of arrangement with the creditors. At the meeting of *April* 7th, it appeared by parol evidence that the plaintiff was present. The entries in the books were objected to by the plaintiff, but admitted by the Lord Chief Justice. The jury having found a verdict for the plaintiff, a rule nisi was obtained for a new trial, on the ground that the bonds were void because they had been issued contrary to the provisions of the act of parliament.

Sir *J. Campbell* Solicitor-General, and *Butt*, on a former day in this term shewed cause (a). The defence that the bonds are void because the meeting at which it was resolved to issue them was irregularly constituted, cannot be set up under the plea of non est factum; it ought to have been specially pleaded; *Whelpdale's case* (b). [*Parke* J. The argument is, that the bonds are not the deeds of the

(a) Before *Denman* C. J., *Parke*, *Taunton*, and *Patteson* Js.

(b) 5 *Rep.* 119.

corporation, unless the resolution to issue them was passed at a general assembly of proprietors, or a special general assembly, convened according to the forms directed by the act of parliament.] This is the deed of the company, for their seal was affixed to it by their authorized agent. The act empowers the company to raise money by bond, but contains no particular enactment as to the mode in which the seal is to be affixed to it. It does not, in terms, require that that shall be done by order of a special general assembly. By the resolution of the first general assembly, the common seal was committed to the custody of the chief clerk, to be used on such occasions as the directors should order. They might therefore order the seal to be affixed to any deed, and thus bind the company; and by sect. 28. of the act, the directors (subject to the directions and orders of the general or special general assembly) have full power to manage and direct the affairs of the company. Any act done by them, therefore, in the course of such management, is valid, if it be not contrary to the orders of a general or special general assembly. Besides, these enactments respecting the constitution of a special general assembly were introduced to regulate the proceedings of the members of the corporation among themselves, and not to enable the company to avail themselves of any irregularity in the constitution of such assemblies to avoid their contracts with a stranger; they are directory, not prohibitory. But, secondly, this defence, if available, is not made out in point of fact, because the entries in the books of the company were not evidence for them. It is quite clear that entries in the public books of a corporation are not evidence for the corporation, unless they be entries of a public nature; *Mar-*

riage

1838.

—
HILL
against
The

MANCHESTER
and SALFORD
Water Works
Company.

1893.

HILL
against
The
MANCHESTER
and SALFORD
Water Works
Company.

riage v. Lawrence (a); Brett v. Beales and Others (b).
There is no clause in the act expressly making the entries evidence. But then it may be said that, as the act (sect. 25.) directs that entries of all proceedings shall be made by the clerk, in books provided by the company, and that the members shall have access to it, and take copies of entries, therefore entries in such books are evidence against the Plaintiff, who is a member of this company; and that he, as such, may be regarded as a partner in a trading concern. But entries in the books of a partnership are evidence against every member of the firm for this reason, that the books are kept either by one of the partners, or by a clerk of all the partners, the partner or clerk being the agent of all the members of the firm. Now the clerk who kept these books was the agent of the company, not of any individual member or members. At all events, the bonds in this case are recognised by the company's deed of assignment.

Sir *J. Scarlett* and *Tomlinson* contra. First, the defence, being that the deed was not properly executed, and therefore not the deed of the corporation, may clearly be given in evidence under the plea of non est factum, and need not be specially pleaded. Secondly, as to the admissibility of the books, the authorities only shew that entries in such books are not evidence of particular facts concerning the property of the corporation, and not of a public nature. But there is no authority to shew that entries of the formal proceedings of a corporation, made in due course, and at a time when there can be no suspicion of a false entry, are not evidence. Besides, the plaintiff

(a) 3 B. & A. 142.

(b) 1 M. & M. 29.

here was not a stranger ; he was a member of the company, and therefore a partner, participating in profit and loss, and might have access to the books and entries : and partnership books are evidence against all the partners. Then, thirdly, the deed of composition does not recognise the validity of these bonds, but only the existence of bonds having the seal of the company duly affixed to them. Here the company, being created by act of parliament, has not authority to execute a deed otherwise than according to the particular terms of that act. The words of the twenty-fourth section, respecting the convening of a special general assembly, are not merely directory but prohibitory ; for it enacts, that the act of the proprietors so met shall be *as valid* with respect to the matter specified in such notice, *as if* the same had been done at any stated general assembly. Now acts done at a general assembly would not be valid unless the number of members required by the act of parliament were present, nor unless notice of the place of meeting were given. Here the notice given for the meeting on the 5th of *December* 1814, did not specify the reason of calling it, nor was the required number of members present at all the adjourned meetings, nor at the one where the resolution to issue the bonds was adopted.

1833.

HILL
against
The
MANCHESTER
and SALFORD
Water Works
Company.

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. This action was on a bond for securing 100*l.* to the plaintiff, who was a member of the company. The defendants pleaded non est factum, and fraud and covin, in several other pleas, all of which were abandoned at the trial, which took place on the first plea alone. The

1833.

HILL
against
The
MANCHESTER
and SALFORD
Water Works
Company.

jury found a verdict for the plaintiff, subject to a motion for a nonsuit, if the Court should be of opinion that the plaintiff was not entitled to recover.

The plaintiff proved that the common seal of the company was affixed to the bond by the officer who had the legal custody of it (*a*), and so threw upon the defendants the burden of clearly proving that it was not set by their authority. The plaintiff further shewed, that the actuary managing the affairs of the company had directed that the bond should be executed.

The defendants undertook to make out in their defence that though the bond was so executed, several requisitions of the act necessary to the validity of such instruments had not been complied with; and it appeared to the Court that such evidence might be admitted under the plea of non est factum. We thought the doctrine of *Whelpdale's* case (*b*) inapplicable, the defendant's case being, not that the deed, though executed by them, was invalidated by collateral matter; but that having been executed in defiance of the enactments which alone give them power to execute such instruments, it was not in point of law executed at all.

Recourse was had to the twenty-third section of the act, which places the common seal at the disposal of the proprietors at large: but we all think that this clause only empowered them to make rules and regulations for its custody, and does not require their concurrence in each particular act of sealing.

The defendants then contended, that the bond was given for a purpose which required the sanction of a special general assembly; that such assembly was, by

(*a*) *Clarke v. The Imperial Gas Light Company*, 4 B. & Ad. 315.

(*b*) 5 Rep. 119.

the act, to be convened only by requisition from proprietors of a certain number and value, after fourteen days' public notice; and that such meeting should consist of a certain number: and they attempted to prove that all these important safeguards for the interest of the great body of proprietors had been neglected in this instance, and the bond executed by the resolution of a meeting at which all these requisites were wanting.

These points of fact, however, could only be established by the books kept by the clerk of the company; and the question now to be decided is, whether they are evidence against the plaintiff? It was argued that they were, because he was a proprietor, and the books of a partnership are evidence against any one of the partners: and more particularly as the act requires such books of the proceedings to be kept, and that all the proprietors shall have free access to them at all reasonable times.

We are, however, of opinion, that the principle on which partnership books are evidence against the partners is, that they are the acts and declaration of such partners, being kept by themselves, or, by their authority, by their servants, and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member; and the free access provided for is only for the purpose of inspection. A proprietor entering into a contract with the company, must be deemed a stranger (*a*), and can be affected by no entry made under orders from the entire body.

Parol evidence was, indeed, produced, to shew that the plaintiff was actually present on the 7th of *April*,

1833.

HILL
against
The
MANCHESTER
and SALFORD
Water Works
Company.

(a) See *Dunston v. The Imperial Gas Light Company*, 3 B. & Ad. 125.

1833.

HILL
against
The
MANCHESTER
and SALFORD
Water Works
Company.

when the resolution to affix the seal to his bond was passed; but that the number then attending was less than that required by law, could only be proved by inspection of the book, which was not written in the plaintiff's presence, but made afterwards, from rough memoranda, by the clerk.

In a former trial between the same parties before Lord *Tenterden*, a deed of composition between the company and several persons having claims upon them, including the plaintiff, had been given in evidence, to prove an express recognition of that bond under the seal of the company. The bond was then held by Lord *Tenterden* to be set up by that acknowledgment, even though informal or irregular in its origin, and a rule for a new trial, founded on an objection to that ruling was refused by the Court. The same evidence was received on the trial of this case, and its effect has been much questioned in the late argument before us. But it is not necessary that we should deliver any opinion on that subject, as we are clearly of opinion that the books of the company are not admissible in evidence for the purpose of establishing the facts therein mentioned against the plaintiff suing the body corporate. The consequence is, that the rule for a new trial must be discharged.

Rule discharged.

1833.

FINNIE *against* MONTAGUE.Monday,
Nov. 25th.

KNOWLES moved for an order upon the signer of the writs for K. B. directing him to sign a pluries bill of *Middlesex*. This action had been commenced before the Uniformity of Process Act, 2 W. 4. c. 39. came into operation, and had been regularly continued by alias and pluries bills of *Middlesex*. Those writs had hitherto been signed by the officer appointed to sign bills of *Middlesex*. The Uniformity of Process Act, however, having now abolished the proceeding by bill of *Middlesex*, the office for signing bills of *Middlesex* had as a consequence been also abolished, and all King's Bench writs are now signed by the same officer. An application had been made to that officer to sign a pluries bill of *Middlesex*, which it was necessary to issue to continue the present action; but he had refused, on the ground that his official seal would not apply to a bill of *Middlesex*, but only to writs issued in the new form. The consequence was, that the plaintiff could not continue his action, and, as a new action would now be barred by the statute of limitations, he would be entirely without remedy.

After the Uniformity of Process Act, 2 W. 4. c. 39., the Court directed the signer of K. B. writs to sign a pluries bill of *Middlesex*, in a suit commenced before the act, and which, if recommenced, would have been barred by the statute of limitations.

Per Curiam. It is reasonable that the plaintiff should be enabled to continue his action; and as all writs are now signed at the same office, we think the signer ought to sign this writ.

Rule granted (a).

(a) This Court had given a like direction in *Storr v. Bowles*, 4 B. & Ad. 112.

1833.

DOE dem. T. STANDISH and W. BLACKBURN
against ROE.

A. having brought an ejectment, had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtor's Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the Court stayed the proceedings in it until the costs of the first were paid.

10 *id.* 761.

A RULE nisi had been obtained to stay the proceedings in this cause until payment of the costs of two former ejectments on the demise of *T. Standish*, brought to recover possession of lands in the county of *Lancaster*, formerly the property of Sir *F. H. Standish*, and then enjoyed by *F. H. Standish*, Esq., who defended as landlord. One of the causes was set down for trial at the *Lancaster* Summer assizes 1818, when the plaintiff withdrew the record. In the following term, the defendant obtained a rule for judgment as in case of a nonsuit, which was discharged on the lessor of the plaintiff undertaking to try the cause at the next assizes. The cause was again entered, and the record again withdrawn. The defendant's taxed costs amounted to 430*l.* In *January* 1831 the lessor of the plaintiff, *Thomas Standish*, was discharged under the insolvent debtors' act. The costs in the above ejectments were inserted in his schedule, and *William Blackburn* was appointed assignee of his estate. This action was brought upon the demises of the insolvent and assignee. The affidavits in support of the rule stated, that *Thomas Standish's* discharge under the insolvent act, and the appointment of *Blackburn* as assignee, had been fraudulently concerted in order to bring an ejectment without paying the costs of the former ejectments; but that was denied in the affidavits on the other side. In *Easter* term last

J. Williams

J. Williams and *Tomlinson* shewed cause (a). The Court will, undoubtedly, in an ordinary case, stay the proceedings in a second ejectment until the costs of the first are paid; but that rule does not apply to a case like the present, where the second ejectment is brought by the assignee of the estate of an insolvent debtor, the first having been brought by the insolvent himself. In *Doe dem. Chambers v. Law* (b), the second ejectment was brought by the assignee of the insolvent debtor, and the first by the insolvent himself, and the Court stayed the proceedings, only because the assignment was a mere contrivance to defraud the defendant. Here all fraud is negatived. The title of the assignee accrued after the first ejectment was determined by the judgment of nonsuit. *T. Standish*, on whose demise the first ejectment was brought, is not liable now to be sued at law for the costs incurred. They are inserted in his schedule. The first ejectment was brought by *T. Standish* for his own benefit; the second by his assignee for the benefit of the creditors. Not only the parties bringing the two ejectments, but the parties interested in the result, are different.

1839.

DOE dem.
STANDISH
against
ROE.

Wightman contra. The general rule is quite clear, that the Court will stay the proceedings in a second ejectment until the costs of the former are paid, provided both be brought to try the same title, *Keen dem. Angel v. Angel* (c), *Doe dem. Cotterell v. Roe* (d); and this rule has been held to apply to a case where the first ejectment was brought by the father of the lessor of

(a) Before Denman C. J., Littleale, Parke, and Patteson Js.

(b) 2 Str. W. Bl. 180. (c) 6 T. R. 740. (d) 1 Chitty's Rep. 195.

1893.

DOE dem.
STANDISH
against
ROE,

the plaintiff against the father of the defendant, in the second; *Doe dem. Feldon v. Roe (a)*. Here the second ejectment is brought on the same title as the first, and the defendant ought not to be subjected to costs of the second until the costs of the first are paid.

Cur. adv. vult.

The judgment of the Court was now delivered by

DENMAN C. J. We think that the rule for staying proceedings in a second ejectment until the costs of a first are paid, applies as well to a case where the second ejectment is brought by the assignee of an insolvent debtor, the first having been brought by the insolvent, as to a case where the second ejectment is brought by the same party as the first. The proceedings, therefore, on the second ejectment must be staid until the costs of the first are paid.

Rule absolute.

(a) 8 T. R. 645.

Monday,
Nov. 25th.

TARDREW *against* BROOK.

Defendant in an action for words, after notice of trial, signed a paper, in which, after reciting that plaintiff had consented on defendant's paying the costs and mak-

ing an apology, to stay proceedings, he made such apology: Held, that this was a positive undertaking by defendant to pay the costs.

Plaintiff in such a case having stayed proceedings, but defendant not paying the costs, the Court will enforce performance of the agreement on his part by rule.

menced

menced an action at law against me for circulating such report, and at my request he has consented, *on my paying the costs of such action* as between attorney and client, *and making an apology*, to stay the proceedings therein: now I, *W. B.*, being satisfied that the said report is false, do hereby apologize to the said *W. T.* for my conduct, and express my sorrow for having circulated such report. Dated, &c. *W. B.*" The notice of trial was countermanded; and the plaintiff's attornies sent in their bill of costs, 65*l.* 7*s.*, to the defendant, but he did not pay it. A rule was obtained in this term, calling on the defendant to shew cause why he should not pay the plaintiff's attornies the sum of 65*l.* 7*s.*, with the costs of this application, to be taxed by the Master; or why the plaintiff should not be at liberty to sign judgment as for want of a plea, and the Master be at liberty to tax the plaintiff's costs under the judgment, as between attorney and client. The defendant, in his affidavit in answer, denied that he had consented to pay the costs, or requested that proceedings might be stayed.

1833.

TARDREW
against
BROOK.

Thesiger now shewed cause. Supposing there had been an absolute undertaking to pay these costs, there is no authority for the Court interfering in a summary manner against a person not an officer of the Court, but merely party in a cause; and the words subscribed by the defendant, "whereas *W. T.* has consented, on my paying the costs and making an apology, to stay proceedings," do not amount to an absolute undertaking to pay. In *Fricker v. Eastman* (a), a judge's order, that, upon payment of debt and costs on or before, &c. all

(a) 11 *East*, 319.

1833. proceedings should be stayed, was held a conditional, not a peremptory order on the defendant.

TARDREW
against
BROOK.

Follett, contra. The agreement, here, is absolute on both sides. As to the power of the Court, the rule now moved for is precisely similar to one which was made absolute in *Riley v. Byrne (a)*, which has been reported, but not on this point.

PARKE J. (b) I think this was not a conditional undertaking. The defendant's signing the apology shewed that there was to be an end of the action, and that it was meant that no further proceedings should be taken. I should have thought, but for the authority of the case referred to, that we could not interfere in the manner proposed; but it is for the benefit of the defendant, who would probably be put to much greater expense if the cause were to go down again for trial. The rule for payment of costs must be absolute.

TAUNTON J. I am of the same opinion. To a common man's mind, this would certainly not appear to be a conditional undertaking; and it should be a very

(a) 2 B. & Ad. 779. The rule above referred to (and mentioned in the report) was of *Hilary* term, 1827. It appeared that the cause having been appointed for trial, the defendant proposed to apologise and pay costs; the plaintiff consented to a settlement on these terms; and the defendant wrote a letter, apologising for the libel complained of, and adding, "I undertake to pay all the law charges which you have sustained, as between attorney and client, upon your withdrawing the action." The plaintiff withdrew the record, but the defendant did not pay the costs. *Campbell* obtained a rule nisi in nearly the same words as that in the above case; and the Court, after hearing *Platt* against the rule (*February* 8th, 1827), made it absolute, as to the costs of the cause and application, as prayed.

(b) *Denman* C. J. was out of Court.

clear

clear case to warrant us in frittering away the effect of such an agreement.

1833.

TARDREW
against
BROOK.

PATTESON J. concurred.

Rule absolute for payment of 6*5*l. 7*s.*, and costs of the application.

The KING *against* The Inhabitants of MATLOCK. *Monday, Nov. 25th.*

AT the *Derbyshire* Midsummer sessions 1832, an order of removal from *Wirksworth* to *Derby* was confirmed, subject to a case. Counsel not agreeing in the statement, it was referred to the chairman to prepare a case; and, after the Spring sessions 1833, the *ex parte* statement on each side was sent to him for that purpose. A case was afterwards returned to this Court, purporting to be signed by the chairman. The attorney for the respondents was of opinion that the statement so returned did not agree with the facts proved at the sessions; and believing, consequently, that it had not been signed or settled by proper authority, he wrote to the chairman on the subject, sending him a copy of the case as stated. The chairman, in his answers, written in *October* and *November* 1833, said that he had no recollection of having been called upon to sign the case, and that he hoped the counsel, by referring to the clerk of the peace, might be able to have a case drawn to the satisfaction of both. The respondents' attorney having applied without success to the attorney on the other side to consent to the case being withdrawn, a rule was obtained in this term, calling on the appellants to shew

cause

Where it has been referred to the chairman at sessions, on an appeal, to state a case, and a case has afterwards, on certiorari, been returned to this Court by the clerk of the peace, purporting to be signed by the chairman, this Court will not send it back to be re-stated, or quash the certiorari, on the ground of the chairman having said that he did not recollect signing the case, and upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, and that deponent believes the chairman did not settle the case.

1838.

—
 The King
 against
 The Inhabit-
 ants of
 MATLOCK.

cause why the orders returned with the certiorari in this case should not be sent back to be restated, or why the certiorari should not be quashed. It appeared by the affidavits, that the signature to the case sent up was not in the chairman's own writing; but the clerk of the peace stated that the original case (transmitted to him *May 31st*) was signed by the chairman, and that, according to the sessions' practice, the copy sent to this Court need not be under the chairman's own hand.

Whitehurst now shewed cause, and contended that, as the signature was now shewn to be, in effect, that of the chairman, no question remained to be determined.

N. R. Clarke contra. If the chairman merely signed a paper pro formâ, and without exercising his judgment upon it, it is not properly a case sent by him. [*Denman C. J.* We cannot enter into such questions. If a case comes before us with the signature, and apparent authority, of the chairman, we cannot, without very strong grounds, presume that it is not his.] Some years ago, in the time of Lord *Tenterden*, this Court interfered, where the chairman had signed an *ex parte* case.

DENMAN C. J. That does not appear to be so here. This is not stated to be the case of either party. No explanation is given by the magistrates themselves. The case comes to us returned to the certiorari by the clerk of the peace, and the matter stated is not sufficient to impeach it.

PARKE J. concurred.

TAUNTON

TAUNTON J. If, upon the argument, the case should appear defective, we can send it back to be re-stated: at present, you are calling upon us for that which we have no authority to do.

1833.

The King
against
The Inhabit-
ants of
MATLOCK.

PATTESON J. concurred.

Rule discharged.

FORD *against* DILLY.

Monday,
Nov. 25th.

THIS was an application on behalf of the sheriff of *Hants*, under the Interpleader Act, 1 & 2 W. 4. c. 58. s. 6., calling upon the plaintiff and several other persons to appear and maintain their claims to certain goods seized in execution in this suit, or else relinquish the same; and to shew cause why the Court should not make such order in the premises as it should think fit, according to the statute. It appeared that the sheriff, in executing a fi. fa. against *Dilly's* goods at the suit of *Ford*, had seized horses, to which several other persons laid claim. Notice of the rule had been given to those parties, to the defendant, and to the plaintiff, according to the act, and all now appeared except the defendant and the plaintiff, the execution-creditor. The claimants before the Court having made out their respective rights to the property,

On application to the Court by a sheriff under sect. 6. of the Interpleader Act, a third party served with the rule, and not appearing, is barred by sect. 3. from further prosecuting any claim brought in question by the rule, as well as where such application is made by a defendant under sect. 1.

The Court, on such application, will, on proper grounds shewn, order the sheriff, or the execution creditor, to pay to a third party appearing and successfully prosecuting his claim, his costs of such appearance.

R. V. Richards, on behalf of one of the claimants, contended that the Court ought now to make an order for restitution, notwithstanding the plaintiff's absence;

for

1833.

 FORD
 against
 DILLY.

for that he, having had notice of the rule, and not appearing, ought to be barred from any further prosecution of his claim, according to sect. 3. of the act; that clause being applicable to cases under sect. 6., where the sheriff seeks relief, as well as under sect. 1., where the relief is sought by a defendant. [*Follett*, amicus curiæ, stated that the Court of Exchequer had so held (a).] *Richards* also contended that the sheriff had been to blame, having seized horses in the stables of a trainer, for a debt due from the owner of the stables; and he suggested that either the sheriff or the plaintiff should pay his client's costs of appearing to this rule; to which point he cited *Bryant v. Ikey* (b).

Jeremy, for the sheriff, denied that he had been in fault, or ought to be charged with costs.

The Court made the following rule (reciting that no person appeared on behalf of the plaintiff or defendant):—That the sheriff do forthwith deliver up to, &c. (naming the several claimants who appeared) respectively, the property claimed by them, taken in execution in this cause; and that it be referred to the Master to determine whether the sheriff or the plaintiff do pay to, &c. (the claimants who appeared) respectively, their costs of appearing before this Court, and that the said costs be paid accordingly.

(a) See *Perkins v. Benton*, 3 Tyr. 51.

(b) 1 Dowl. Pract. Cases, 428. And see *Perkins v. Benton*, above cited.

C A S E S

ARGUED AND DETERMINED

1834.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fourth Year of the Reign of WILLIAM IV.

FORSTER *against* TAYLOR.

ASSUMPSIT for the price of fifteen firkins of butter sold and delivered by plaintiff to the defendant.

At the trial before *Patteson J.* at the *Carlisle Spring* assizes 1832, the following facts appeared: — The plaintiff was a farmer, and defendant an innkeeper, both residing in the county of *Cumberland*. The contract for the purchase, and also the delivery of the butter,

is required to brand his Christian and surname on such vessel, together with the exact weight or tare thereof, or in default thereof, he is to forfeit, for every such vessel not so marked, 10s. By sect. 3. every dairyman, farmer, &c., who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid, and shall brand his Christian and surname on different parts of the vessel, therein described, and on the butter contained in such vessel, upon penalty of forfeiting, for every default, 5*l*.

In an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to defendant, it appeared that the firkins were not marked according to the act:

Held, that the provisions which required the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked; that the subject-matter of this contract was in such a state, from the vessels not being properly marked, that the sale of it was forbidden by act of parliament; and consequently, that the contract of sale was void, and the plaintiff could not recover.

Held, further, that although there was a penalty imposed in the same clause of the act, which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty; but that the clause might be used against him as a defence to an action.

By 36 G. 3. c. 88., entitled, an "An Act to prevent Abuses and Frauds in the packing, Weight, and Sale of Butter," (s. 2.) every cooper, or other person making a vessel for packing butter,

were

1834.

FORSTER
against
TAYLOR.

were proved; but, after the plaintiff had closed his case, it was objected that the statutes of 36 G. 3. c. 86., and 38 G. 3. c. 73. (a), having made several enactments relative to the sale of butter, the plaintiff should have proved that those requisites had been complied with, and, not having done so, could not recover. The learned Judge, however, was of opinion that the plaintiff was not bound to give the evidence as part of his original case, but that the onus lay on the defendant to prove that the plaintiff had not complied with the statutes. The defendant's case was then gone into, and the jury found that there was a deficiency in the weight of the butter (the evidence as to that being that seven firkins of the butter fell short of the weight required by 36 G. 3. c. 86.), and also that the casks were not marked according to the directions of the acts. A verdict was entered for the plaintiff for 15*l.* 11*s.* 6*d.*, which allowed 1*l.* to be deducted for the deficiency in weight (twenty-four pounds), and the defendant had liberty given him to move to enter a nonsuit.

Courtenay and Blackburne, in *Hilary* term 1833, shewed cause. (b) The fact of the firkins of butter not having been branded and marked, and of some of them not having the proper weight, does not invalidate the contract of sale. The acts of parliament prescribe certain regulations for carrying on the trade in butter, and, among others, that every tub, firkin, &c., shall contain a specific quantity, and shall be branded with the name of the cooper, packer, dairyman, or seller of butter. It contains no clause avoiding a contract of sale with

(a) See the clauses set out in the judgment.

(b) Before *Littledale, Taunton, and Patterson* Js.

respect to which these regulations have not been observed; but it imposes a penalty for the violation of each of them. Then, in this case, there has been no more than a breach of a parliamentary regulation protected by a penalty; and, according to *Johnson v. Hudson* (a), *Brown v. Duncan* (b), and *Wetherell v. Jones* (c), the contract of sale is not avoided. It may be said that these statutory provisions were intended to protect the buyer against the fraud of the seller, and therefore that, according to *Law v. Hodson* (d), the contract of sale was void. There the 17 G. 3. c. 42. had required bricks made for sale to be of certain dimensions, and given a penalty for breach of this regulation, but did not expressly avoid every contract for the sale of bricks of less than the required dimensions; still a contract for the sale of such bricks was held to be void. That decision is open to this objection,—that the act, being penal, ought not to have been extended by construction; and that the legislature, when it imposed a penalty for breach of the regulation, must be taken to have given all the remedy intended. It is unnecessary, however, to impugn the authority of that case, for it is distinguishable from the present; since, assuming that the imposition of a penalty for breach of the provision, that bricks made for sale should be of a certain size, vitiates a contract made for the sale of bricks of less dimensions; here, in the stat. 36 G. 3. c. 86., is a clause (subsequent to those which require the tubs, &c., to contain the proper weight, and to be marked in the manner specified) which recognizes the validity of a contract of sale, even though those requi-

1834.

 FORSTER
 against
 TAYLOR.

(a) 11 East, 180.

(b) 10 B. & C. 93.

(c) 3 B. & Ad. 221.

(d) 2 Camp. 147. 11 East, 300.

1834.

FORSTER
against
TAYLOR.

sites have not been complied with. Sect. 6. enacts, "That every cheesemonger, dealer in butter, or other person, who shall sell to any person any tub, firkin, &c. of butter, shall deliver in every such tub, &c. the full quantity appointed by the act, or in default thereof shall be liable to make satisfaction to the person who shall buy the same, for what shall be wanting." Besides, if the breach of any one of these several regulations for the packing of butter in the vessels described in the act, avoids every contract of sale, a multiplicity of issues might be raised on the trial of every action brought to recover the price of butter sold in casks. It might be made a question whether the tub or other vessel in which it was contained, had the required weight, or whether it was branded with the Christian and surname of the cooper, or of the packer, dairyman, or seller, or whether the vessel had been properly soaked; for the breach of any one of these regulations would, according to the argument, avoid the contract. *Tyson v. Thomas* (a) is distinguishable, because the statute 22 & 23 Car. 2. c. 12. not only imposed a penalty, but a forfeiture of the corn bought or sold.

Aglionby and *Dundas* contra. This action is not maintainable, because it is brought to enforce a contract made in contravention of the provisions of an act of parliament intended to protect the public, generally, against fraud in the sale and purchase of butter, and more particularly to protect the buyer against the fraud of the seller. It is a well established rule, laid down by Lord *Holt* in *Bartlett v. Viner* (b), that if a statute inflicts a penalty for doing an act, the penalty implies a pro-

(a) 1 *M'Clel. & Younge*, 119.

(b) *Carth.* 252.

hibition,

hibition, and the thing is unlawful, though there be no prohibitory words in the statute; as where a statute inflicts a penalty for making a particular contract, as a simoniacal or usurious contract, the contract is void. In *Law v. Hodson (a)*, the statute required bricks made for sale to be of certain dimensions, and gave a penalty for breach of that regulation; and that being intended to protect the buyer against the fraud of the seller, was held to render void any contract for the sale of bricks of less than the required dimensions. There it was argued, as here, that the legislature had not avoided the contract, but only subjected the brick-maker to a penalty. The decision in *Little v. Poole (b)* proceeded on the same principle, and there *Law v. Hodson (a)* was recognised as authority. In *Langton v. Hughes (c)*, a druggist (after the stat. 42 G. 3. c. 38., which prohibited the using of any thing but malt and hops in brewing beer, but before the 51 G. 3. c. 87., which prohibited druggists from selling to brewers under a penalty), sold and delivered drugs to a brewer, knowing that they were to be used in brewing; and it was held that he could not recover the price of them, because the object of the former statute was to protect the public health. There, also, it was contended that the selling and buying were not prohibited; and *Law v. Hodson* was cited, and recognised by the Court. In *Bensley v. Bignold (d)* it was held, that a printer cannot recover for labour and materials used in printing any work, unless he affixes his name to it pursuant to the 39 G. 3. c. 79. s. 27., the provision being made *for public purposes*; and there the argument was, that the statute contained no

1834.

 FORSTER
 against
 TAYLOR.

(a) 11 East, 307.

(b) 9 B. & C. 200.

(c) 1 M. & S. 593.

(d) 5 B. & A. 335.

1834.

 FORSTER
 against
 TAYLOR.

prohibition, but a mere regulation protected by a penalty. So in *Tyson v. Thomas* (a), it was held by the Court of Exchequer, that an action will not lie for breach of a contract for the sale of corn by the hobbett, which is in contravention of the provisions of the 22 Car. 2. c. 8. s. 2., and there *Langton v. Hughes* (b) was cited with approbation by *Hullock B.* *Johnson v. Hudson* (c) is distinguishable; because in that case there was a mere breach of revenue regulations protected by a penalty: those regulations attached to the plaintiff personally only, and affected him with the penalty in order to secure the licence duty. There was nothing in the statute directly or indirectly prohibitory of the contract. The same observation applies to *Brown v. Duncan* (d) and *Wetherell v. Jones* (e); and in the last of those cases Lord *Tenterden* lays it down as a general rule, that where a contract which a plaintiff seeks to enforce is expressly or by implication forbidden by the statute or common law, no Court will lend its assistance to give it effect; and that principle, which was fully recognised and acted upon in the still later case of *Rex v. Gravesend* (g), applies to the present case. For here the statute, as it expressly makes it an offence, subject to penalty, for any person to pack any butter for sale in any vessel not marked or branded as therein required, must have intended to prevent the sale of butter in vessels not properly marked. As to sect. 6., there is a preamble to that clause which seems intended to limit it to retail dealers as distinguished from farmers.

Cur. adv. vult.

(a) *M'Clel. & Younge*, 119.

(c) 11 *Enst*, 180.

(e) 3 *B. & Ad.* 221.

(b) 1 *M. & S.* 593.

(d) 10 *B. & C.* 93.

(g) 3 *B. & Ad.* 240.

LITTLEDALE J., in the course of this term, delivered the judgment of the Court. After stating the facts of the case, and that, in the opinion of the Court, the learned Judge was perfectly right in holding that the onus lay, at all events, on the defendant to prove that the plaintiff had not complied with the statutes, his Lordship proceeded as follows : —

1834.

FORSTER
against
TAYLOR.

Upon the question of deficiency of weight, there could be no ground for a nonsuit, because, as to eight of the casks, there was no evidence that they were deficient in weight, and the contract not being for one entire sum for the whole parcel, but at the rate of so much per firkin, the plaintiff would be entitled to recover for as many firkins as were of full weight.

On the other point, that the casks were not marked according to the directions of the acts of parliament, we should be rather disposed to think, on a perusal of the Judge's notes, that there was scarcely sufficient evidence for the jury to have come to the conclusion they did ; but we must take the finding of the jury to be right, as there is no question about a new trial, and the amount of the damages is not so large as that it should be granted as on a verdict against evidence. The title of the act of 36 G. 3. c. 86. is " An Act to prevent abuses and frauds in the packing, weight and sale of butter, and to repeal certain acts relating thereto." And the title of the act of 38 G. 3. c. 73. is " An Act for amending and rendering more effectual an act made in the thirty-sixth year of the reign of his present Majesty," intitled, &c. (giving the former title).

The former acts made on this subject are one of the 13 & 14 Car. 2. c. 26., of which the title is " An Act for reforming of the abuses committed in the weight and false

1834.

FORSTER
against
TAYLOR.

packing of butter;" and another of 4 & 5 *W. & M. c. 7.*, the title of which is "An Act to prevent abuses committed by the traders in butter and cheese."

In these former acts, several of the provisions in the later acts now in force, or nearly similar ones, are introduced, and, in some instances, much heavier penalties than in the existing acts. The attention of parliament has, therefore, at an early period, and on several occasions, been directed to prevent frauds and abuses, and to provide for the protection and benefit of the public relative to the sale of butter. The regulations as to marking the casks, in the second section of the 36 *G. 3. c. 86.*, are, "that every cooper or other person making a vessel for packing butter shall, on the bottom of such vessel, brand his Christian name and surname at length, to denote that it is the mark of the cooper or maker of the vessel, together with the exact weight or tare, or in default, for every such offence shall forfeit 10s." And in the third section, "that every dairyman, farmer, seller of butter, or other person who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid, and no other, and shall, on the bottom thereof on the inside, and on the top on the outside, brand his Christian name and surname at length, and shall also brand on the top on the outside, and on the bouge or body of the vessel, the true weight or tare of such empty vessel, and shall also brand his Christian name and surname at length on the bouge or body of every vessel, across two different staves at least, and shall also imprint his Christian name and surname upon the top of the butter," upon pain and penalty of forfeiting for every such offence the sum of 5*l.*

The first section of the 38 *G. 3. c. 73.*, after reciting,
amongst

amongst other things, "that the act was much avoided by concealing the places of abode of the coopers making the vessels, and of the dairymen or other packers of butter," enacts, "that every cooper or other person making such vessel, shall, on the bottom of the vessel on the outside, in addition to his Christian name and surname, brand the name of his place of abode or dwelling in the manner directed, or in default, shall forfeit and pay the sum of 10s." The second section directs, "that every factor or agent, who shall buy or sell, or for the purpose of sale have in his custody any vessel containing butter for sale, not made and marked according to the directions of the act, shall forfeit and pay 20s." It is to be observed of the latter act, that although it recites that the former act had been evaded by concealing the places of abode of the dairymen and other packers of butter, yet the enacting part leaves them out, and only mentions coopers and other persons making the vessels.

The 36 G. 3. contains several provisions as to the weight of the butter in each cask, the not mixing one kind of butter with another kind, and the mode of salting the butter, but which are not now the subject of discussion; but the provisions as to marking the names are made with a view, that if the butter be made or put up in a way contrary to the directions of the act, or be otherwise liable to be complained of, the person who is aggrieved may know where the original fault is committed, and be able to obtain redress.

As the jury have found that the casks were not marked according to the act, it is to be considered what effect that has as to the present action. In *Bartlett v. Viner*, reported in *Carthew*, 252., Lord *Holt* says, that "every contract made for or about any matter or thing which is

1834.

 FORSTER
 against
 TAYLOR.

1834.

FORSTER
against
TAYLOR.

prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." And in the report of the same case in *Skinner*, 322., the Court say, that "in every case where a penalty is annexed to the doing of such an act, though it be not prohibited, yet if such a thing appears upon the record to be the consideration, the agreement is void." And "in every case, where the statute inflicts a penalty for doing such an act, though the act be not prohibited, yet the thing is unlawful."

Where acts have been passed, containing regulations as to articles which are the subject of sale, and the policy of the acts is for the security of the buyers, and to protect them against the frauds of the seller, it has been held that the seller cannot recover the price. And within this rule, the present case appears to us to fall.

The case of *Law v. Hodson*, in 2 *Campbell*, 147., and afterwards, on a motion for a new trial, in 11 *East*, 300., was decided on this principle. The statute 17 G. 3. c. 42., in the first section, directs that bricks shall be made of a certain size; and in the second section, a penalty is given for not doing so: and the bricks, which were the subject of the action, being under the statutable size, it was considered to be a fraud on the buyer, whom the legislature meant to protect, and the plaintiff was held not entitled to recover the price.

Tyson v. Thomas (a) was an action for not delivering twenty hobbetts of barley; and it was objected, that the action could not be maintained, the statute

(a) *McClelland & Y.* 119.

22 *Car. 2. c. 8. s. 2.* having enacted, that if any person shall buy or sell any corn by any other measure than the *Winchester* bushel, he shall forfeit 40s.; and the 22 & 23 *Car. 2. c. 12. s. 2.* having, besides the former penalty, imposed the further penalty of losing the corn or the value; and as it appeared that the hobbett was an uncertain measure, it was held, that it was a sale in a manner prohibited by the statutes of *Car. 2.*, and that the plaintiff could not recover. It must be observed, that the selling by customary measure is now authorised by the 5 *G. 4. c. 74.* under certain restrictions. *Little v. Poole* (a) was an action to recover the price of some coals. The 47 *G. 3. sess. 2. c. lxxviii.* contains several regulations as to the sale of coals; it directs the vender to deliver to the purchaser a ticket which is to contain the number of sacks, the name of the coals sent, the name of the vender, and the name of the labouring meter, and it subjects the vender of the coals for not doing so to a penalty of 20*l.* The ticket did not follow the directions of the act as to the labouring meter; and it was held, that as the provision of the act was to protect the buyer against the fraud of the seller, the seller was not entitled to recover the price. These cases more particularly apply to the acts of parliament which are considered as being for the protection of parties to a contract of sale.

There are several other cases where acts of parliament have been infringed in other respects. In one of *Langton v. Hughes* (b), the plaintiffs were druggists, and they sold drugs to the defendants, who were brewers, knowing that they were to be used in the brewing of beer, which was contrary to the provisions of an act of

1834.

FORFEIT
against
TAYLOR.

(a) 9 *B. & C.* 192.(b) 1 *M. & S.* 593.

1834.

FORSTER
against
TAYLOR.

parliament; and Lord *Ellenborough* there states, that it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament, cannot be made the subject-matter of an action. There are other cases where contracts have been made on the Lord's day, which are within the statute of 29 *Car. 2. c. 7*. Others arising out of transactions connected with smuggling. Other cases arising out of transactions where the name of the printer has not been inserted in the document published. Others arising out of contracts relating to unlicensed places of public exhibition or resort, which are carried on in a manner not authorised by law. Others arising out of disabilities in attornies and apothecaries not having the proper certificates to practice. Others out of illegal insurances: the names of which several cases need not be enumerated; and the general principle is laid down, that where the provisions of an act of parliament have been infringed, no contract can be supported arising out of it.

There are, however, some cases where the rule has been held not to apply; as in *Johnson v. Hudson* (a) where the plaintiff, a factor, sold tobacco segars, but had not entered himself as a dealer in tobacco, nor had he a licence, and the tobacco went without a permit, and it was held that the plaintiff might recover the price, as there was no fraud intended, and there was nothing in the act which rendered the contract illegal, and it was only a breach of revenue regulations protected by a penalty, by which we apprehend is to be understood revenue regulations meant to attach to the plaintiff personally, and affect him with the penalty in

(a) 11 *East*, 180.

order to secure the licence duty, but in no way to prohibit the contract. It is to be observed also that the court intimate that the plaintiff was not to be considered as a dealer in tobacco at all within the meaning of the act. In *Brown v. Duncan* (a) the five plaintiffs carried on business as distillers. By the statute 6. G. 4. c. 81. s. 7., each person who is a distiller ought to be named in the licence; and by another act, no person who is a vender or retailer of spirits, ought to be licensed as a distiller within the limited distance. One of the plaintiffs was not named in the licence, and he carried on the business of a retailer of spirits within the limited distance. But notwithstanding this, the plaintiffs were held entitled to recover the price of the whisky sold in their trade as distillers, which had been guaranteed by the defendant; for there had been no fraud on the part of the plaintiffs on the revenue, though they had not complied with the excise regulations, which it was thought wise to adopt, in order to secure, as far as might be, the conduct of the trader in such a way as was deemed most expedient for the benefit of the revenue, and the plaintiff was held entitled to recover. These regulations were considered to be of the same nature as those referred to in the case of *Johnson v. Hudson*, not directly or indirectly prohibitory of the contract on which the action was brought.

In *Wetherell v. Jones* (b), the plaintiff was a rectifier of spirits, and sold spirits to the defendant, who was a confectioner. The spirits were above proof, though described in a permit as being under proof. It was held, that the statute 6 G. 4. c. 80. did not apply to dis-

1834.

 FORSTER
 against
 TAYLOR.

(a) 10 B. & C. 93.

(b) 3 B. & Ad. 221.

1834.

FORSTER
against
TAYLOR.

tillers of spirits; and as there was no provision in the act to regulate the strength of *British* spirits, the contract was not illegal, nor were the spirits prohibited goods; and it was further held, that the irregularity of the permit, though it arose from the plaintiff's own fault, and was a violation of the law by him, did not deprive him of the right of suing upon the contract, which was in itself perfectly legal, — there being no agreement, express or implied, that the law should be violated by such improper dealing. But it was also there held, that where a contract which the plaintiff seeks to enforce, is expressly or by implication forbidden by the statute or common law, no Court will lend its assistance to give it effect. "But where the consideration and the matter to be enforced were both legal," the Court said they were not aware "that the plaintiff had ever been precluded from recovering by an infringement of the law (not contemplated by the contract) in the performance of something to be done on his part."

But the present case does not come within any of the cases last cited, because here the acts of parliament are made for the protection of the public against frauds, and also the subject-matter of the contract is in such a state, for want of the casks being properly marked, that the sale of it was prohibited by act of parliament.

It is necessary, however, to notice one point arising out of this act of parliament, — that the penalty is given in the same clause which directs the thing to be done; and it might therefore be said that the thing is only directed to be done, subject to a penalty, and not absolutely; and in *Law v. Hodson*, the case most frequently referred to of late on these subjects, in the report in *2 Campbell*, 147., Lord *Ellenborough* notices that the
penalty

penalty is given in a separate clause. In the case of indictments arising out of provisions in acts of parliament which subject parties to penalties, where the penalty is given in the same clause which enacts the offence, it has been held, that if the offence was not one at common law, you cannot have a general indictment for the offence under the act of parliament, and can only proceed for the penalty. In *Rex v. Wright (a)*, which was an indictment against the defendant, and charged that he, being a spiritual person, did take to farm several lands against the statute of 21 *Hen. 8. c. 13. s. 1.*, on an application to quash the indictment, Lord *Mansfield* said he always took it, "that where new-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued; for otherwise the defendant would be liable to a double prosecution:—one upon the general prohibition, and the other upon the particular specific remedy." The same limited rule, however, does not seem to have been adopted in civil actions, so as to confine the proceedings against the party offending to the penalty; and we are not aware that the observation of Lord *Ellenborough* as to the penalty being given by a separate clause has been noticed at any other time; and, indeed, in many of the cases which have occurred, the penalty is given in the same clause. Upon the whole of this case, we are of opinion that judgment of nonsuit must be entered.

Judgment of nonsuit.

1834.

FORSTER
against
TAYLOR.

(a) 1 *Burr.* 543.

1834.

Saturday,
January 11th.

HUNT *against* MASSEY.

In an action by drawer against acceptor of a bill of exchange for 101*l.*, defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in defendant's handwriting, purporting by its date to have been written after he came of age, addressed to a third person, in these words:—
"I request you to pay *H.*"
(the plaintiff)
"101*l.* at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill."
This letter was proved to have been delivered to plaintiff's clerk, but it did not appear when.

Held, that the letter must, *prima facie*, be taken to have been written and issued at the time when it bore date; and that, having been written after defendant came of age, and before the bill became due, it would support a count on a promise to pay according to the tenor and effect of the bill.

ASSUMPSIT by the plaintiff, as drawer of a bill of exchange dated the 1st of *February* 1832, for 101*l.* payable five months after date, and accepted by the defendant. Plea, general issue. At the trial before *Denman* C. J. at the *London* sittings after last *Michaelmas* term, the following appeared to be the facts of the case:—The defendant accepted the bill of exchange in *February* 1832, being then under age; he became of age on the 19th of *June*, and the bill became due on the 4th of *July* 1832. The following letter, in the defendant's handwriting, bearing date the 22d of *June* 1832, addressed to his guardian, was given in evidence:—"I request you to pay to Mr. *W. H. Hunt* 101*l.* at your earliest convenience after the date of this letter, from the money left me by my late grandfather, *Robert Andrews Esq.*, for which I have given my bill." This letter had been delivered by the defendant to the clerk of the plaintiff, as stated in his examination in chief, on the day it bore date: on his cross-examination he stated he could not state the precise day when it was delivered. It was objected that it ought to have been clearly shewn that the letter was written after the defendant became of age: secondly, that the letter did not amount to a promise to pay the bill: and thirdly, that the plaintiff ought to have declared specially; because the plaintiff was liable, if at all, not by reason of his acceptance of the bill, but of a promise made after he

had

had come of age. The Lord Chief Justice directed the jury to find a verdict for the plaintiff.

1834.

HUNT
against
MANN.

Platt now moved for a new trial, and contended, first, that some evidence ought to have been given to shew that the letter was written at or about the time it bore date, or, at least, before the defendant attained his full age; secondly, that the language of the letter did not amount to a promise to pay, but a mere request to a third person to pay on the defendant's account a sum of money to the plaintiff out of a particular fund; and, thirdly, that if the letter did amount to a promise to pay, it did not support any count in the declaration. The contract in the special count to pay according to the tenor and effect of the bill of exchange was alleged to have been made on the 19th of *June*. If the letter amounted to a promise, that promise was made on the 22d of *June*. [*Taunton J.* Where a voidable contract is made by a party under age, and ratified after he has attained his full age, is it not usual to declare on the original promise? The first promise here was voidable only. (a) As soon as it was ratified, it became binding ab initio. *Patteson J.* If the defendant had pleaded infancy specially, the plaintiff might have replied, that after he had attained the age of twenty-one years, he assented to and ratified and confirmed the several promises in the declaration. And the letter would be good evidence to support that replication, for it is an order to the defendant's agent to pay the very money for which he had given the bill. *Littledale J.* The case might be different if the defend-

(a) *Gibbs v. Merrill*, 3 *Taunt.* 307.

1834.

—
HUNT
against
MARSH.

ant had become of age, and written the letter, after the bill had become due; then, perhaps, he could not be said to have promised to pay according to the tenor and effect of the bill of exchange.]

DENMAN C. J. The letter must be presumed *prima facie* to have been written on the day on which it bore date. It lay on the defendant to shew that it was not; and if so, it then amounted to a ratification of the original promise to pay, according to the tenor and effect of the bill of exchange, and might be declared on accordingly.

LITTLEDALE, TAUNTON, and PATTESON Js. concurred.

Rule refused.

Monday,
January 19th.

FAWCETT *against* CASH.

On the 5th of March 1832, A. entered as warehouseman into the service of B., the latter engaging to pay A. at the rate of 12l. 10s. per month for the first year, and to advance 10l. per annum until the salary was 180l.: Held, that this was a contract by B. to employ A. for one whole year.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into his employ, in the capacity of a warehouseman, from the 5th of March 1832, at a salary agreed upon between them, to wit, at the rate of 12l. 10s. per month for the first year, and after that period at an advance of 10l. per annum until the salary should be 180l. per annum, the defendant promised the plaintiff to retain and employ him in his, defendant's, service in the capacity aforesaid, at and for the salary aforesaid, and continue him in such employ for one whole year, to wit, from the day aforesaid. Averment, that the plaintiff entered into

into the employ of the defendant in the capacity and on the terms aforesaid, and continued in such employ until the 28th of *January* 1833; and although the plaintiff, on the day and year last aforesaid, was ready and willing to continue in the employ of the defendant for the remainder of the said year, yet the defendant refused to suffer him so to continue, and discharged him therefrom without any reasonable or probable cause. The second count stated the contract to be to continue the plaintiff in such employment until the expiration of six months from and after notice given by the plaintiff or defendant to the other of them of his intention to put an end to such service, or else to pay the plaintiff a proportionate part of the said wages for six months. The third count differed from the second in stating the contract to be to employ the plaintiff until and after the expiration of three months after notice; the fourth count stated it to be, to employ the plaintiff in defendant's service until the expiration of a reasonable period from and after notice to determine such service. There was also an indebitatus count for wages. Plea, general issue. At the trial before *Denman* C.J., at the *London* sittings after *Michaelmas* term 1833, it appeared that on the 5th of *March* 1832, the plaintiff entered into the service of the defendant, who signed the following paper:—" *William Cash* engages to pay *Thomas Fawcett* 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary is 180*l.*, from the 5th of *March* 1832." The plaintiff continued in the defendant's service until the 20th of *January* 1833. The plaintiff's wages had been paid monthly to the 5th of *January* 1833, and this

1834.

 FAWCETT
 against
 CASH.

1894.

FAWCETT
against
CASH.

action was brought in *Hilary* term 1893, to recover 25*l.*, being the wages of 12*l.* 10*s.* per month from the 5th of *January* to the 5th of *March* 1893. Sir *J. Campbell*, Solicitor-General, contended that there was no proof of any contract by the defendant to continue the plaintiff in his employ for a year; or until six or three months, or a reasonable time after notice, as alleged in the second, third, and fourth counts; and that the action having been commenced in *Hilary* term 1893, the year had not expired, and therefore the plaintiff could not recover under the indebitatus count. Sir *J. Scarlett*, contra, contended that there was proof of a contract to continue the plaintiff in the defendant's service for one year at least; that where no time was defined in the contract, the law presumed it to be for a year. The Lord Chief Justice directed the jury to find a verdict for the plaintiff for 25*l.*, but reserved liberty to the defendant to move to enter a nonsuit.

Sir *J. Campbell*, Solicitor-General, now moved accordingly. The agreement was not evidence of the contract (stated in the first count) to employ the plaintiff for one whole year, from the 5th of *March* 1892. The words in the agreement, "for the first year," refer to the rate of wages, which, if the contract continued in force for one year, was to be 12*l.* 10*s.* per month; and if for a longer period, was to be increased. If that be so, there is nothing from which it can be inferred that it was to continue in force for a year. It might continue in operation, not only for one, but for four years; for an increased rate of wages is provided if it continue during the latter period; but there is no more ground for saying that it is

an

an absolute agreement for one year, than for four years. Then if that be so, the payment of the wages monthly being the only circumstance from which the duration of the contract can be collected, it is a contract for one month only. [*Patteson J.* In *Beeston v. Collyer* (a) the plaintiff served the defendant as clerk for a number of years, and his salary during one year was paid quarterly, but, during the last six years, monthly; and it was held that the payment of the wages monthly, did not rebut the general presumption that the hiring was for a year.] There a yearly contract was to be inferred from the continuance of the service, and the payment of the salary during the one year quarterly. Assuming this to be a contract for a year, it was determinable by a month's notice, and ought to have been declared on accordingly. Then as to the other three counts, there was no proof of any contract to employ the plaintiff until the expiration of six or three months, or of a reasonable period after notice by either party to determine the contract.

DENMAN C. J. It seems to me that the contract alleged in the first count of the declaration was proved. The general rule is, that if a master hire a servant, without mentioning the time, that is a general hiring, and in point of law a hiring for a year. Then, assuming that the agreement in this case does not specify the period for which the service or employment was to continue, it must be taken to be a contract for a year's service; and if a general hiring is, in point of law, a contract for one whole year, the stipulation here that

1834.

FAWCETT
against
CASH.

(a) 4 Bing. 309.

1834.

FAWCETT
against
CASH.

there is to be an advance of 10*l.* per annum until the salary is 180*l.*, does not make it less a contract for a year.

LITLEDALE J. The agreement proved is, to pay the warehouseman 12*l.* 10*s.* per month for the first year, and an advance of 10*l.* per annum until the salary is 180*l.* The parties, therefore, contemplated, first, that the contract was to continue for one year at *all events*; and, secondly, that it might continue for four: in which case there was to be a yearly advance of salary. In the case of domestic servants, the rule is well established, that the contract may be determined by a month's notice or a month's wages; but that depends upon custom. Here no custom having been proved, the contract must be taken to have been a hiring for a year.

TAUNTON J. I am of the same opinion. The substance of the first count is, that the defendant undertook to retain and employ the plaintiff in his service as a warehouseman for one whole year; the agreement proved was, *W. Cash* engages to pay *T. Fawcett* 12*l.* 10*s.* per month for the first year, and an advance of 10*l.* per annum until the salary is 180*l.* That imports that the contract was to continue in force for one whole year, and that it might last longer than one year, viz. for four years. It is unnecessary to consider what the effect would have been if the dismissal had taken place after the first year; because it is perfectly clear that the parties intended that the plaintiff should be bound to serve, and the defendant bound to retain and employ the plaintiff for the whole year. If this had been a case of settlement,

tlement, the contract would have been good proof of a yearly hiring.

1854.

FAWCETT
against
CASH.

PATTESON J. This is not the case of a domestic servant, where the contract might have been put an end to by paying a month's wages or giving a month's warning. There was clearly a contract for one year at least. The words "for one year" do or do not refer to the period of service. If they do, it is in terms a contract for a year; if they do not, then no time is mentioned, and it is a general hiring for a year.

Rule refused.

CROOK *against* JADIS.

Monday,
January 13th.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant, as the drawer of a bill of exchange, dated the 23d of *May* 1831, for 1000*l.*, accepted by Lord *Foley*, and payable eleven months after date. Plea, general issue. At the trial before *Denman* C. J., at the *Middlesex* sittings after last *Michaelmas* term, the defence was, that the bill, as between the drawer and acceptor, was a mere accommodation bill, and had been issued by the defendant to a bill broker to get discounted; and that the latter had fraudulently, and without any authority, sold it to one *Howard*, for whom the plaintiff discounted it. On the evidence it was contended, that the plaintiff had not used due caution, and that he had taken the bill under circumstances which ought to have excited the suspicion of a prudent man;

In an action by the indorsee against the drawer of an accommodation bill, which had been fraudulently disposed of by the first indorsee, and afterwards discounted by the plaintiff, it is no defence that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained: the defendant must shew that the plaintiff was guilty of gross negligence.

1834.

 CROOK
 against
 JADIS.

that the bill had not been fairly obtained, and therefore he was not entitled to recover. Lord *Denman* C. J. told the jury to find for the plaintiff, if they thought he had not been guilty of gross negligence in taking the bill under the circumstances given in evidence. A verdict having been found for the plaintiff,

Sir *James Scarlett* now moved for a new trial, on the ground that the true question which ought to have been submitted to the jury was, whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent man; *Down v. Halling (a)*.

DENMAN C. J. I used the expression *gross negligence* advisedly, because I thought nothing less ought to have prevented the plaintiff from recovering on the bill.

LITLEDALE J. There must be gross negligence, *at least*, in a case like the present, to deprive a party of his right to recover on a bill of exchange.

TAUNTON J. I think the case was properly submitted to the jury. I cannot estimate the degree of care which a prudent man should take. The question put by the Lord Chief Justice, whether the plaintiff was guilty of gross negligence, was more definite and appropriate.

PATTESON J. I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man.

Rule refused.

1834.

GIBBS and CLAYTON, Executors of ELIZABETH EDWARDS, *against* SOUTHAM. *Friday, Jan. 17th.*

DEBT on bond for 1512*l.* given to the testatrix.

The condition was as follows:—“That if the above bounden *Thomas Southam*, his heirs, executors, or administrators, shall and do well and truly pay unto *Elizabeth Edwards*, her executors, administrators, or assigns, the full sum of 756*l.*, with interest after the rate of 5*l.* for each 100*l.* for a year, without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force.” The defendant, in his fourth plea, pleaded that *Elizabeth Edwards* in her lifetime did not, nor have, nor hath the plaintiffs or either of them, as executors, since her death, after the making of the said writing obligatory, and before the exhibiting the bill of the plaintiffs, &c., demanded payment of the said sum of 756*l.*, with interest, &c. General demurrer and joinder.

An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made.

G. T. White was to have argued in support of the demurrer (*Jan. 17th*), but the Court called on

Humfrey for the defendants. The money was not payable before express demand. There could have been no doubt on this point if the money had, in the body of the condition, been expressed to be payable on demand: *Carter v. Ring (a)*, *Simpson v. Routh (b)*. Here the

(a) 3 *Camp.* 459.

(b) 2 *B. & C.* 682.

1834.

GLASS
against
SOUTHAM.

stipulation for the payment of interest shews that the bond was not to be forfeited till default upon an actual demand. The plaintiff seeks to recover a penalty, which is a collateral sum; and the cases with regard to payment of money on request, where there is an antecedent duty, do not apply. This was the argument of counsel (*Abbott*) in *Carter v. Ring* (a). *Birks v. Trippet* (b) shews that where an undertaking is to pay a collateral sum on request, an actual request is necessary before action brought. Here the payment of the penalty is collateral to the payment of the money secured by the condition, just as where the condition is for the performance of any other kind of act. [*Littledale J.* It is said in *Co. Lit.* 208. a., that, “in case of a condition of a bond, there is a diversity between a condition of an obligation, which concerns the doing of a transitory act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to be performed presently, that is, in convenient time; and when, by the condition of the obligation, the act that is to be done to the obligee is of its own nature local, for there the obligor (no time being limited) hath time during his life to perform it, as to make a feoffment, &c., if the obligee doth not hasten the same by request.”] The convenient time cannot be fixed by the Court, and should, therefore, be determined by the demand.

DENMAN C. J. A bond given to secure the payment of a sum of money generally gives a cause of action

(a) 3 Comp. 459.

(b) 1 Saund. 32.

which

which is not collateral. The obligation to pay arises upon the execution of the bond. I never heard that want of a demand was an answer to an action like this.

1834.

Given
against
SOUTHAM.

LITTLEDALE J. The plea is no answer. In the case of a single bill the action is a demand. A different rule prevails where there is a bond with a penalty to secure the performance of a collateral act: there the question is, whether the defendant has shewn the performance of the condition. In *Carter v. Ring (a)*, the money by the terms of the condition was payable upon demand, and issue was joined on the fact of the demand. The passage quoted from *Lord Coke* shews that here the money was payable immediately, that is, in convenient time. It is not necessary at present to determine how the convenient time is to be ascertained.

TAUNTON J. concurred.

PATTESON J. I am of the same opinion. The condition here says nothing as to a demand.

Judgment for plaintiffs.

(a) 3 Comp. 489.

1834.

Friday,
Jan. 17th.

BESWICK *against* JAMES SWINDELLS.

Debt on bond. The condition, after reciting that the obligor was about to marry with *A.*, a widow, and thereby to become possessed of a stock in trade; and it was agreed that he should execute a bond to pay to the children of *A.* by her late husband, 300*l.* within twelve months after her death, in the event thereafter specified, was, that "if the obligor should, within twelve months after the decease of *A.*, pay to her children 300*l.*, if, upon an account taken, the stock in trade and effects in the business, (if then carried on by the obligor), should amount to 400*l.*; but in

DEBT on bond, dated 7th of *April* 1813, from the defendant and *John Swindells* (since deceased), in the sum of 400*l.* The condition set out on oyer recited, that a marriage was intended to be shortly had between *James Swindells* and *Elizabeth Etchells*, of *Stockport*, linen draper, by which event *James Swindells* would become possessed of a considerable stock in trade, goods, chattels, and effects, then her property, and in her possession; and it was agreed upon the treaty for the said marriage, and in consideration of the emolument which *James S.* would acquire by such marriage, that *James S.* should execute a sufficient bond to the plaintiff, to pay to the children of *E. Etchells*, by her late husband *Edward Etchells*, the sum of 300*l.* within twelve months next after the decease of *E. Etchells*, in the event thereafter specified; the condition was, "That if the above bounden *James Swindells*, his heirs, executors, &c. do and shall, within twelve months next after the decease of the said *E. E.* his intended wife, pay or cause to be paid unto the child or children of the said *E. E.* by the said *Edward Etchells* deceased,

case, upon such account to be taken, the stock in trade should amount to less than 400*l.*; then if the obligor should pay to the children of *A.* 120*l.*; the bond should be void."

Plea, that long before the death of *A.* the obligor retired from and ceased to carry on the trade, and that at the death of *A.* he had not any stock in trade, and that no account of the said stock in trade in the condition mentioned was or could be taken at the time of the death of *A.* or from thence hitherto: Held, on demurrer, that the true construction of the condition of the bond was, that the obligor had an option to continue or discontinue the trade during the life of *A.*; and that, he having discontinued it, the event on which the money was to come to the children of *A.* had never happened; and that the plea, therefore, was good.

which

which shall be then living, or the issue of such of them as shall be then deceased leaving lawful issue, (such issue taking only the part or share his, her, or their deceased parents or parent would have been entitled unto if living,) the sum of 300*l.* unto and equally between them in the proportions aforesaid if more than one, and if but one child, then the whole to such surviving child, if upon an account of the stock in trade and effects in the linen-drapery, haberdashery, or mercery trade or business, if then carried on by the said *James Swindells*, shall amount to the sum of 400*l.*; but in case, upon such account to be taken as aforesaid, the said stock in trade and effects shall amount to less than that sum, then if the said *James Swindells*, his heirs, executors, &c. do and shall pay or cause to be paid unto the child or children of the said *Elizabeth E.* by the said *Edward E.* deceased, or the survivor of them, or the issue, &c. in manner before limited, the sum of 120*l.* within the space of twelve months next after the decease of the said *Elizabeth E.*, then the before written obligation shall be void and of none effect, but the same shall otherwise be and remain in full force and virtue."

Plea, that after the solemnization of the marriage, and long before the commencement of this suit, to wit, &c., the said *Elizabeth* his wife died; and that long before the death of his said wife, to wit, on, &c., *James Swindells* retired from and ceased, and from thence hitherto has ceased to carry on the said trades and businesses, or any of them, or any other trade or business whatever; and that at the time of the death of *Elizabeth* he had not, nor has he at any time since hitherto had, nor had he at the time of the commencement of this suit, or since, nor has he now, any stock in
trade

1834.

 BEWICK
 against
 SWINDELLS.

1834.

—
Brewick
against
Swindle

trade or effects in the linen-drapery, haberdashery, and mercery trades and businesses, or in any of them, or in any other trade or business whatever, and that no account of the said stock in trade and effects in the said condition mentioned was or could be taken at the time of the death of *Elizabeth*, or at any other time from thence hitherto.

Replication, that, at the expiration of twelve months from and after the decease of *Elizabeth*, to wit, on, &c., there were and still are living two children of *Elizabeth* by *Edward Etchells*, and lawful issue of another child of *Elizabeth* by *E. E.*, deceased in *E. E.*'s lifetime, to wit, &c.

Special demurrer, assigning for cause, that the defendant by his plea had pleaded matter which was a complete answer to the declaration, and a complete defence to this action, independent of the fact of *E. B.* having any children by *Edward Etchells*, yet that the plaintiff had not by his replication answered, traversed, or denied, the matter so pleaded, or any part thereof. Secondly, that it appeared by the said condition set out in the plea, that the said writing obligatory was subject to a condition, breaches whereof ought to have been assigned or suggested by the replication, according to the statute; and yet no breach was so suggested or assigned; and also that if issue were joined on the replication, such issue would be immaterial. Joinder.

Wightman for the defendant. The replication is undoubtedly bad. The question will be, whether the plea be good. The condition of the bond makes the payment of either of the sums of 300*l.* or 120*l.* to the children of *E. E.* depend on certain contingencies: first, her death; secondly, the carrying on of the business

at

at that time; and, thirdly, the taking an account of the stock in trade. The plea alleges, that two of these three contingencies never happened; and, consequently, shews that the money never became payable to the children. The words, "if then carried on," over-ride the whole condition, and make the carrying on of the trade a condition precedent to the payment of either sum of money. [Taunton J. Is not the sum of 120*l.* payable at all events?] That sum is to become payable in case, "on *such* an account to be taken, the stock in trade be less than 400*l.*" The word *such* incorporates, by reference, the preceding qualification, that the business be then carried on. The plaintiff could not assign a breach of the condition without averring that the business was carried on by *James Swindells* at the death of the wife. Assuming, even, that the words of the condition are in this respect ambiguous, still, being introduced for the benefit of the obligee, they must be construed favourably for the obligor and against the obligee: *Sheppard's Touchstone*, c. 21. p. 375. In *Brett v. Pildredge*, cited by *Wyndham J.*, in 1 *Siderfin*, 102., "a father, upon the marriage of his daughter, made a proviso, that if his daughter should die within two years, then her husband should repay 500*l.* of her portion: the daughter had issue, and afterwards she and her issue died within two years; and it was adjudged that the husband should not repay the 500*l.*; for, by the having of issue, the condition was fulfilled." Construing the words of the condition here favourably for the obligor, there can be no doubt that the carrying on of the trade at the death of the wife was a condition precedent to any money becoming payable to her children; and then the plea is good,

1834.

 Drawn
 against
 SWINDILLS.

1834.

BRIDGICK
against
SWINDLELLS.

good, because it shews that, by the terms of the condition itself, the money never became payable.

Follett contra. The defendant has not got rid of the obligatory part of the bond by pleading that he had ceased, before the death of the wife, to carry on the business; that he had then no stock in trade of which an account could be taken. In order to take advantage of the condition of the bond, he ought by his plea to have shewn performance, or some valid excuse for non-performance. The plea does not shew that the bond had become void by performance of the condition; for the condition makes the bond void, not if *J. S.* shall cease to carry on the business, but if the sums of money therein mentioned be paid to the children of the wife within twelve months after her decease; otherwise the bond is to remain in full force and virtue. It not being averred, therefore, that those sums were paid, the bond remained in force. The effect of the plea is, not that the defendant performed the condition, but that, by the happening of an event, such performance had become impossible. But it ought to have further shewn that it had become impossible by the act of God, the act of the law, or of the obligee: *Com. Dig. tit. Condition*, L. 6., L. 12., L. 13. *Sheppard's Touchstone*, p. 372. It is there said that, "If *A.* be bound to *B.* that *J. S.* shall marry *Jane G.* by such a day, and before the day *B.* himself marry with *Jane G.*, hereby the obligation is discharged, and *B.* shall never take advantage of it." Here the ceasing to carry on the trade must be taken to be *primâ facie* the act of the obligor. It is, therefore, no excuse for his non-performance of the condition: on the contrary, the very
act

act was a breach of the condition; *Com. Dig. Condition*, M. 2., M. 4. [*Patteson J.* The words "if then carried on by *James Swindells*," shew that the parties contemplated that it was possible that *James Swindells* might or might not carry on the business at the death of his wife.] Still the plea must shew either performance of the condition, or some valid excuse for its non-performance. To make the bond void by reason of the business not having been carried on at the death of the wife, the condition must be read as if it declared that the bond should be void "if the business shall cease to be carried on at the death of the said *Elizabeth*. Besides, the words "if not then carried on," are not in the second part of the sentence which provides for the payment of the 120*l*. [*Littledale J.* Those words are incorporated therein by reference, because the second part of the sentence begins with the words "*upon such account*."] Those words import that the obligor is to pay a certain sum in the event there specified, but not that he is to pay nothing. The true meaning of the parties was, that if the stock in trade was worth 400*l*., the obligor should pay 300*l*., but if not worth that sum, then 120*l*.; whether the business was or was not carried on at the death of the wife. [*Littledale J.* The question is, whether performance of the condition has not been rendered impossible by an event contemplated by the convention of the parties; whether it was not their intention that neither of the sums should be payable to the children unless the business was carried on, at the death of the wife, by *James Swindells*. *Denman C. J.* The parties may have meant, that *James Swindells* was to exercise his discretion whether he would carry on the business or not. It never could have been intended

1834.

 BESWICK
 against
 SWINDELLS.

that

1834.

 BESWICK
 against
 SWINDLELL.

that he should be obliged to carry it on if it were a losing concern.] *James Swindells* having acquired by marriage the property of his wife, it is absurd to suppose that the parties meant to leave it at his option to do or not to do the act on which the payment of the money is made to depend. But assuming that to be the true construction of the condition, then, as performance before the death of the wife became impossible by the act of the obligor, the condition thereby became null and void, and the bond remained in force; for where the thing to be done by the condition is such as in its nature is impossible to be done at the time of the making of the obligation, there the obligation is good, and the condition only is void; *Sheppard's Touchstone*, c. 21. p. 372. Here the thing to be done, though possible at the time of making the obligation, was rendered impossible before the time for performance arrived, by the act of the obligor. Suppose a bond were conditioned to pay *A.* 600*l.*, if the obligor should be at *Rome* within six months, and he was not there; the non-performance of the condition would be the act of the party himself. The obligatory part of the bond would continue in force. [*Patteson J.* That would be an obligation to pay on a condition that failed.] It may have been the very object of the bond to compel *James Swindells* to carry on the business. The obligee could derive no benefit from the obligor's having ceased to carry it on; and he ought to have continued to do so, if he meant to avail himself of the condition.

Wightman, in reply. The true construction of the bond is shewn, not only by the words of the condition itself, but by the recited agreement of the parties on which

which it is founded. That agreement was to execute a bond to pay to the children 300*l.* within twelve months after the decease of the wife *in the event thereafter specified*. Now, the event after specified (independent of the death of the wife), is the taking of an account of the stock in trade in the business, *if then carried on by James Swindells*. The obligor, therefore, was not bound to carry on the business at all events. If he had *fraudulently* ceased to carry it on, that, if replied, might have been an answer to the plea. It is not shewn that the discontinuance of the business was the act of the obligor. The profits of the trade may have ceased, and the stock in trade may have been entirely consumed without his default. Then, assuming that, according to the true construction of the bond, the obligor might discontinue the trade; or that it ceased without his default, the plea is good; for the fact stated in it is a valid excuse for non-performance of the condition, because it appears by the former part of the record, that the parties had expressly agreed, that, on the happening of the event mentioned in the plea, the condition should not be performed. Secondly, the plea is good, also, because it shews that there never was any breach of the condition or forfeiture of the bond; for it alleges that, before the death of the wife, an event happened which rendered any performance or breach impossible: and the case is not one of those (which are extreme ones) where the obligee becomes entitled to consider the obligation as single: for the words are neither insensible; nor was the condition impossible at the time of making, or against law. *Com. Dig. tit. Obligation, E. (a).*

(a) This case was argued by *Wightman*, on Friday the 17th of January, in the absence of *Fullet*; when the Court gave judgment nisi for defendant.

1834.

~~Banister~~
~~against~~
 SWINDELLS.

1834.

BRISWICK
against
SWINDLELL.

DENMAN C. J. It is imposible to say that this is a clear case on either side. It struck me, at first, that, by the condition of the bond, the thing to be done by the obligor was made to depend on a contingency which had not happened, and therefore he was not bound to do it. I thought that, as *James Swindells* had ceased to carry on the business before the death of his wife, and there was then no stock in trade of which an account could be taken, the money had not become payable to the children of the wife; and I now think that first impression was correct. The true construction of the condition appears to me to be, that *James Swindells* was to have an option to carry on the business or not; and if that be so, then the fact stated in the plea, that he had ceased to do so before the death of his wife, and that there was then no stock in trade of which an account could be taken, was a sufficient excuse for non-performance, because the parties agreed in effect that it should be so; as appears by the condition of the bond set out on oyer. Besides, I am not prepared to say that it must be taken, on these pleadings, that the cessation of the trade was the act of the obligor. I think we shall violate no rule of law by holding, that the defendant is entitled to judgment, on the ground either that non-performance of the condition was excusable, because, by the contract between the parties, it was not to be performed in the event alleged in the plea, or on the ground that the trade may have come to a determination without any default of the obligor.

Afterwards, on the same day, *Follett* was heard for the plaintiff; and *Wightman* was heard in reply on the 24th of January; when the Court gave final judgment.

LITLEDALE J. I am of the same opinion. It is said that there must be performance of the condition, or a lawful excuse for non-performance; that there can only be such lawful excuse where performance has become impossible by the act of God, the act of law, or of the obligee; and that here it became impossible by the act of the *obligor*, because he might have continued to carry on the business. But it seems to me that, according to the true construction of this condition, the obligor was not bound, at all events, to carry on the business; and if not, the plea in bar, that it was not carried on at the death of Mrs. *Etchells*, is a good answer to the action.

1834.

 BESWICK
 against
 SWINDELLS.

TAUNTON J. The language of the condition is very much involved. The payment of the money is made to depend on several contingencies; if, at the death of the wife, the business is carried on by *James Swindells*, and if, upon an account taken, the stock shall be of such or such a value. As no account was taken, or could be, at the death of the wife, and the business had then ceased, I think the plea is good; and I am not prepared to say, that the circumstance of its not being possible to take an account of the stock at the wife's death, necessarily implies that there was misconduct in the defendant, or that he, by his improper act, had rendered the taking of such an account impossible.

PATTESON J. The condition of this bond must be construed like other agreements, looking at what is contained within the four corners of the instrument. It is said, that it was absurd to leave it at the option of the party

1834.

BESWICK
against
SWINDELLS.

party bound, to do or not to do the act on which the money was to become payable; but it is not denied, that the parties might so agree, and the only question is, whether they have done so here or not. The condition is, that if *J. S.* shall, within the space of twelve months after the death of the wife, pay to her children then living 300*l.*, if, upon an account taken, the stock in trade in the business (if then carried on by *J. S.*) shall amount to 400*l.*; but in case, upon such account to be taken, it should amount to less, then 120*l.* Now, on the face of the condition itself, I think it was meant to be in the option of *J. S.* to put an end to the trade if he thought proper so to do. Suppose the condition had been to pay the children six months after the obligor's marriage, if it took place; the obligor would not be bound to marry. Here the condition is to pay the money to the children of the wife, provided, at her death, *J. Swindells* shall carry on the business. It is expressly provided, that 300*l.* shall be paid if the stock in trade amount to 400*l.*, and if it amounts to less than that sum, then 120*l.* only. It is clear, therefore, that the parties contemplated that the obligor might diminish the value of the stock; and if so, why might they not agree that he should destroy it altogether? I think the plea is good, and that the defendant is entitled to judgment.

Judgment for the defendant.

1834.

THOMPSON and Another *against* JAMES PERCIVAL
and CHARLES PERCIVAL.

THIS was an action for goods sold and delivered.

The defendant, *Charles*, pleaded the general issue. The defendant, *James*, pleaded his bankruptcy (*a*); and, as to him, a *nolle prosequi* was entered. On the trial before *Denman C. J.*, at *Guildhall*, after *Hilary* term, 1833, the following facts appeared: — The defendants were in partnership until the 22d of *December* 1829, when an advertisement was inserted in the *London Gazette*, announcing the dissolution of the partnership, and that the business would be carried on by the defendant *James*, who would receive and pay all debts. The chief part of the goods in question was delivered before the dissolution: the other part was ordered by *James Percival* after the 22d of *December*. It did not appear that, when these goods were delivered, the plaintiffs had had notice of the dissolution. On the dissolution, effects were left in the hands of *James* sufficient to pay the debts due from the partnership. In the beginning of 1830, the plaintiffs' collector applied for the balance

A. and *B.* dissolved partnership, and agreed that the business should be carried on by *B.* alone; and that he should receive and pay all debts. Sufficient partnership funds were left in his possession. *C.*, a creditor of the firm, afterwards applied for payment of his debt to *B.*, who informed him that *A.* knew nothing of his debt, and that he, *C.*, must look to *B.* alone. *C.* then drew a bill on *B.*, which he accepted, but which was afterwards dishonoured: Held, in an action brought by *C.* against

A. and *B.*, (the latter having become bankrupt), that it was a question for the jury, whether it had been agreed between *C.*, the creditor, and *B.*, that the former should accept *B.* as his sole debtor, and take his acceptance in satisfaction of the debt due from both: Held, further, that such an agreement and receipt of the bill would be a good defence to *A.*'s suit, by way of accord and satisfaction; and that the fact of *B.* having had the partnership effects left in his hands, and having agreed with *A.* to pay all the partnership debts, was evidence of an authority from *A.* to make such agreement on his behalf.

After a rule for a new trial had been granted on the above grounds, *A.* also became bankrupt, but *C.* did not prove his debt under the commission. *A.*'s attorney having carried down the record by proviso, *C.* applied for a *stet processus*, alleging that he could derive no benefit from proceeding. The Court refused to interfere.

(a) See 2 *B.* & *Ad.* 968.

1834.

THOMPSON
against
PERCIVAL.

to *James Percival*, who told him that *Charles* knew nothing of these transactions, and that the plaintiffs must look to him (*James*) alone. The plaintiffs afterwards drew a bill on *James*, at three months, for the mixed amount, which was accepted by *James*, and dishonoured; and the plaintiffs gave him time to pay, but eventually brought this action against both defendants. Upon these facts, a verdict was taken for the full amount claimed, with leave to move for a nonsuit, if the Court should be of opinion that the plaintiffs had discharged *Charles Percival* from the debt. A rule nisi having been obtained for that purpose,

Sir *J. Scarlett* and *Chilton* in last *Michaelmas* Term shewed cause (*a*). *Charles* the retiring partner was not discharged from his liability by reason of the plaintiffs' having taken *James's* acceptance, which was afterwards dishonoured. *Charles* was originally liable as principal, and must continue liable, unless the debt appears to have been satisfied, and it lies upon him to shew that he is discharged from that liability. There was no evidence of any promise by the plaintiffs to release *Charles*. They ought to have done some act to discharge him. Their drawing the bill upon the remaining partner was a mere compliance with the terms of the notice that he would pay all debts of the firm. *David v. Ellice* (*b*) is an authority to shew that that act was not sufficient to discharge the outgoing partner. There, one of several partners retired, and notice was given to a creditor of the firm, that the remaining partners had assumed the funds, and would discharge the partnership debts: the

(*a*) Before *Denman C. J., Parke, Taunton, and Patteson J.*

(*b*) 5 B. & C. 196.

creditor assented to this arrangement, and the debts due from the old firm were transferred to the account of the new; the creditor afterwards drew on the new firm for a part of his balance, which was paid; but that firm subsequently becoming insolvent, he brought an action for the remainder against all the members of the old firm; and it was held that the retiring partner was liable for the debts incurred before the dissolution of the partnership. [*Parke J.* This case differs from that, because here when the bill was drawn, the plaintiffs were told they were to look to *James Percival* alone.] There was no agreement by the plaintiffs to discharge *Charles* the retired partner. [*Parke J.* There was strong evidence of such an agreement.] There was no consideration for a promise by the plaintiffs to discharge *Charles*. Their taking the acceptance of the one partner did not change the nature of the original debt, which was the debt of the two. The mere liability of the one partner on the bill is no consideration for the plaintiffs' discharging the other. In *David v. Ellice (a)* there was much stronger evidence of an agreement by the creditor to discharge the retiring partner; for the balance due to him was transferred to his credit by the new firm, and he was informed of it, and assented to it, and afterwards drew on the new firm for a part of the balance, and they accepted and paid his bill. [*Parke J.* The decision in that case was not satisfactory to the profession. Suppose the plaintiffs and the two partners had met together, and the outgoing partner had then agreed to transfer all the effects to the continuing partner, and the creditor had agreed to look to him only, and had then

1834.

 THOMPSON
 against
 PERCIVAL.

(a) 5 B. & C. 196.

1834.

THOMPSON
against
PERCIVAL.

drawn the bill upon him.] The transfer of the funds by the outgoing to the continuing partner would be no consideration for a promise by the creditor to release the retired partner. In *Lodge v. Dicus* (a), on a dissolution, it was agreed between the two partners, that one should take upon himself to discharge a debt due to a particular creditor, who was informed of the agreement, and expressly undertook to exonerate the other partner from all responsibility; yet, as the debt was not satisfied by the one, nor any fresh security given, the promise of the creditor was decided by this Court to be without consideration, and, therefore, not to constitute any defence to an action brought by him against both partners. In *Bedford v. Deakin* (b), one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right of action against all the three, and retained possession of the original bills; the separate notes having proved unproductive, it was held that the creditor might still resort to his remedy against the other partners, and that the taking the separate notes, and afterwards renewing them several times, did not amount to satisfaction of the joint debt. Here, even if *James* be considered not as a partner, but as a mere agent (after the dissolution) of *Charles*, for the purpose of paying the debts of the firm, the latter is not discharged by reason of the plaintiffs' having taken the security of *James*: *Robinson v. Read* (c). There a tradesman having supplied goods to a ship,

(a) 5 B. & A. 611.

(b) 2 B. & A. 210.

(c) 9 B. & C. 449.

sent in his account to the owner's agent and ship's husband, and took his acceptance at three months (the usual credit) for the amount, deducting discount; and when the bill became due, consented to a renewal of it, adding interest; he afterwards in like manner took a third acceptance which was dishonoured, and the agent then failed, the balance in his hands in favour of the ship owner having, during all this time, exceeded the amount of the bill, which was, however, unknown to the principal, he never having inspected the agent's accounts. It was held that the tradesman might sue the ship owner for the amount of his claim, and that it was not discharged by the plaintiff's having taken the acceptance of the agent, and suffered it to be renewed.

1834.

THOMPSON
against
PERCIVAL

Sir *J. Campbell*, Solicitor-General, and *Hoggins*, contra. *Lodge v. Dicus* (a) was decided on the ground that, as the debt was not satisfied by the continuing partner, nor any security given, the promise of the creditor to exonerate the retiring partner was without consideration. Here there is a consideration for such promise. A consideration may arise either from an advantage accruing to the party to whom the promise is made, or a prejudice to the promisee. Here, the plaintiffs, who, before they took the bill, must have been aware of the agreement between the two partners, that *James* should carry on the business, and that the effects should remain with him, and that he should pay all debts, did not press *James* to pay their debt, but gave him credit and took his acceptance, and when the bill was dishonoured, they again gave him a fresh credit. If they had pressed

(a) 3 B. & A. 611.

1834.

 THOMPSON
 against
 PERCIVAL.

James in the first instance, they might have obtained payment; and if he had not paid, and they had had recourse to *Charles*, he might have withdrawn his funds. The latter must have been prejudiced by their not enforcing payment. In *Bedford v. Deakin (a)* there was no evidence of any agreement by the creditor to discharge the retiring partner; but, on the contrary, there was an express reservation of his rights against all three. In *Evans v. Drummond (b)*, a partnership debt was paid by a bill of exchange, which, when due and after notice of dissolution, was renewed by the creditor's taking the separate bill of the remaining partner. There Lord *Kenyon* said, — "Is it to be endured, that when partners have given their acceptance, and where, perhaps, one of two partners has made provision for the bill, that the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion, that when the holder chooses to do so, he discharges the other partner. Here the plaintiffs have taken the bill of *C.* (the continuing partner), after he admits that he was informed that *D.* (the retired partner) had nothing to do with the concern. It is a reliance on the sole security of *C.*, and discharges the defendant." In *Reed v. White (c)*, the action was brought, for cordage sold, against the defendants as owners of a ship. The plaintiff took *White's* bill, who was the managing owner, or ship's husband, for the amount, which was dishonoured and renewed, and again dishonoured. For the other defendants it was insisted, that the plaintiff had discharged the other owners, who, in ignorance of this mode of dealing between the plaintiff

(a) 2 B. & A. 210.

(b) 4 Esp. N. P. C. 89.

(c) 5 Esp. N. P. C. 122.

and

and *White*, had suffered him to receive large sums of the *East India Company* for freight, which they would otherwise have detained. Lord *Ellenborough* there said, — “ If the plaintiff, dealing with *White* separately, has adopted him, he has discharged the others, and must have a verdict against him.” — “ The question is, whether it” (the bill) “ was intended as a settlement with him alone, and adopting him as the single debtor.” Then, assuming that *James* may be considered the agent of *Charles* for the purpose of paying the partnership debts, here the plaintiffs have voluntarily given an enlarged credit to the agent by taking his acceptance, and *Charles* is thereby placed in a worse situation than he otherwise would have been, and therefore discharged: *Strong v. Hart (a)*, *Smith v. Ferrand (b)*. A receipt given by a creditor to an agent will not operate as a discharge to the principal, unless the latter appear to have dealt differently with his agent in consequence of the receipt, as by passing the sum in his accounts, and giving him further credit on the faith of that voucher. *Wyatt v. The Marquis of Hertford (c)*, and *Robinson v. Read (d)*, proceeded expressly on the ground that the creditor had, by taking the bill of the agent of the debtor, obtained no advantage, and the principal debtor had sustained no prejudice. Here *Charles Percival* was prejudiced by the plaintiff taking the acceptance of *James* instead of insisting on payment, because his funds were thereby suffered longer to remain in the hands of *James*, and were ultimately lost.

1834.

 THOMPSON
against
PERCIVAL

Cur. adv. vult.

(a) 6 B. & C. 160.

(b) 7 B. & C. 19.

(c) 3 East, 467.

(d) 9 B. & C. 449.

1834.

THOMPSON
against
PERCIVAL.

DENMAN C. J. in this term delivered the judgment of the Court. After stating the facts of the case, and observing that as it did not appear that the plaintiffs had any notice of the dissolution at the time either of the order or delivery of the goods, there was no difference between that part of the debt contracted before and that contracted after the dissolution, his Lordship proceeded as follows:—

It appears to us, that the facts proved raised a question for the jury, whether it was agreed between the plaintiffs and *James*, that the former should accept the latter as their sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both. If it was so agreed, we think, that the agreement and receipt of the bill would be a good answer on the part of *Charles Percival* to this demand, by way of accord and satisfaction. It is not necessary to determine whether the assent of *Charles* to this agreement was necessary, in order to give it such an operation; because if it was, there is evidence of a delegation by *Charles* to *James* to make such an agreement, for *James* had the partnership effects left in his hands, and was to pay all the partnership debts. It cannot be doubted, but that if a chattel of any kind had been, by the agreement of the plaintiffs, and both the defendants, given and accepted in satisfaction of the debt, it would have been a good discharge. It is not required that the chattel should be of equal value, for the party receiving it is always taken to be the best judge of that in matters of uncertain value, *Andrew v. Boughey*(a). Nor can it be questioned but that the bill of exchange of third persons, given and accepted in satisfaction of the

(a) *Dyer*, 75. a.

debt,

debt, would be a good discharge. But it is contended that the acceptance of a bill of exchange by one of two debtors cannot be a good satisfaction, because the creditor gets nothing which he had not before. The written security, however, which was negotiable and transferable, is of itself something different from that which he had before; and many cases may be conceived in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways: and whether it was actually more beneficial in each particular case, cannot be made the subject of enquiry.

The cases of *Lodge v. Dica* (a) and *David v. Ellice* (b), are said to be against this view of the law. In the former, however, no new negotiable security was given, nor does the difference between the joint liability of two, and the separate liability of one, appear to have been brought under the consideration of the Court. In the latter, no bill of exchange was given, and that decision, on consideration, is not altogether satisfactory to us. We cannot but think that there was abundant evidence in that case to go to a jury (and upon which the Court might have decided), of the payment of the old debt by *Inglis, Ellice, and Co.* to the plaintiff, and a new loan to the new firm; which might have been as well effected by a transfer of account by mutual consent as by actual payment of money.

The cases of *Evans v. Drummond* (c) and *Reed v. White* (d) are authorities the other way. In the former,

(a) 3 B. & A. 611.

(b) 5 B. & C. 196.

(c) 4 Esp. N.P.C. 92.

(d) 5 Esp. N. P. C. 122.

Lord

1834.

THOMPSON
against
PERCIVAL.

1834.

THOMPSON
against
PERCIVAL.

Lord *Kenyon* points out forcibly the altered relation of the parties by the substitution of the bill of the remaining partner for that of the firm; and it is difficult to see on what ground he decided the case, unless upon this, viz. that such substitution under an agreement operated as a satisfaction, as far as regarded the retiring partner; and in *Reed v. White*, Lord *Ellenborough* acted upon that authority and so directed a special jury of merchants, who entirely agreed with him. These cases were afterwards brought to the notice of Lord *Ellenborough*, who expressed his approbation of them, in *Bedford v. Deakin* (a). That case, however, (which was also before the court in 2 B. & A. 210.) was distinguished from them, because the creditor there expressly reserved the liability of the original debtors.

If, therefore, the plaintiffs in this case did expressly agree to take, and did take the separate bill of exchange of *James* in satisfaction of the joint debt, we are of opinion that his so doing amounted to a discharge of *Charles*. No point was expressly made at the trial as to the proof of such agreement, nor was it required that the question should be put specifically to the jury. We think that this ought to be done, and consequently the rule must be made absolute for a new trial.

Rule absolute.

In *February* 1834 *Charles Percival* became bankrupt. On the 3d of *May* his attorney gave notice that he should carry down the cause by proviso; and it was so carried down on the 3d of *June*, without the concurrence of *Charles Percival's* assignees. The plaintiffs had not proved under the commission.

(a) 2 Stark. N.P.C. 178.

Chilton,

Chilton, in *Trinity* term 1834, moved, on behalf of the plaintiffs, for a *stet* processus, on the ground that they would otherwise be compelled to proceed in this action, without any possibility of benefit if the cause went on, inasmuch as the certificate would be a bar to debt and costs, if they obtained a verdict; and he contended that, under 6 G. 4. c. 16. s. 59. (a), the Court had an equitable power to grant this rule.

1834.

 THOMPSON
 against
 PERCIVAL.

Hoggins shewed cause in the first instance. The application is novel. The statute 6 G. 4. c. 16. s. 59. gives the plaintiffs the choice between the two courses of continuing the action, or proving under the commission. As they have not proved, they must be held to have elected to proceed in the action. Again, *Charles Percival's* attorney has a right to take the record down by proviso, in order to enforce his lien for his costs in the event of the plaintiffs failing to obtain a verdict. The bankrupt had the right himself of carrying the cause down by proviso; for if this application were to succeed, his own attorney's costs would be proved against the estate.

Lord DENMAN C. J. It does not appear that any authority can be produced, sanctioning our interference

(a) It enacts, "that no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit;" and afterwards, that "the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved, provided that such creditor shall not be liable to the payment to such bankrupt or his assignees, of the costs of such action or suit so relinquished by him."

in

1834.

THOMPSON
against
PERCIVAL.

in this case; and in default of a direct authority, we see no ground for our granting the application. The plaintiffs were the best judges as to the propriety of commencing the action in the first instance; and they have not elected to take the course pointed out by the fifty-ninth section of the bankrupt act, of proving under the commission and abandoning the action.

LITTLEDALE J., TAUNTON J., and WILLIAMS J., concurred.

Rule discharged.

Friday,
January 17th.

SADLER *against* NIXON.

One of several partners in trade, who pays money on account of his co-partners, cannot maintain an action against them for contribution on the ground that he made such payment not voluntarily but by compulsion of law.

ASSUMPSIT for money paid by the plaintiff to the defendant's use, &c. At the trial before *Denman* C. J., at the *London* sittings after last *Michaelmas* term, the following appeared to be the facts of the case: — The plaintiff, the defendant, and another person, being co-partners in trade, employed a builder to repair a building which was their joint property, and in which they carried on their trade. The builder brought an action against the three co-partners for the repairs, and obtained judgment, but took the plaintiff only in execution, who, in order to regain his liberty, paid the whole debt. The present action was brought to recover one third of the money so paid. It was contended that the plaintiff, one of the three joint contractors, having been *compelled* to pay money which his co-contractors were jointly liable to pay, was entitled to maintain

maintain this action. On the other hand, it was said that the plaintiff and the defendants in the first action being not merely co-contractors, but co-partners in trade, *one* of them could not maintain an action against the other to recover money paid on account of the firm, but that his remedy was by bill in equity; the reason why an action at law in such a case was not maintainable, being, that it would be useless for one partner to recover what, upon taking a general account among all the partners, he might be liable to refund, and this objection applying as well to a compulsory as to a voluntary payment. The Lord Chief Justice was of that opinion and nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

1834.

 SADLER
 against
 NIXON.

F. Pollock on a former day in this term moved accordingly. It may be conceded that where one partner *voluntarily* makes a payment on account of the others, he cannot maintain an action at law against his co-partners; but it is otherwise where the payment is by *compulsion*. In *Merryweather v. Nixon (a)*, where there had been a recovery in *tort* against two defendants, and the whole damages were levied on one, it was held that the one could not recover a moiety against the other for his contribution; Lord *Kenyon* there said, that he had never before heard of such an action having been brought, where the former recovery was for a *tort*; and “that the distinction was clear between this case and that of a joint judgment against several defendants *in an action of assumpsit*.” It may be said, that that dictum only goes to shew that contribution can be recovered at

(a) 8 T. R. 186.

1834.

SADLER
against
NIXON.

law where parties have become jointly liable in an insulated transaction, and not where there is a partnership; but it can make no difference whether the parties were joint contractors in the particular transaction only, or in several others. The principle on which the plaintiff is entitled to recover is, that he has been *compelled* to pay out of his own funds money which the defendant was jointly liable to pay. [*Patteson J.* In *Helme v. Smith (a)*, a part-owner of a ship, who, as ship's husband, had incurred the expense of outfit, sued another part-owner for his share of the expense; it was answered that no action lay, inasmuch as the plaintiff and defendant appeared to be partners; and *Tindal C. J.* there said, "If, indeed, the plaintiff and defendant were partners, there is an end of the question; but part owners of a ship are not *necessarily* partners."] In that case, the part-owner had paid the money voluntarily and not by compulsion.

Cur. adv. vult.

Lord DENMAN C. J. now delivered judgment, and said, the Court were of opinion that there was no ground for the distinction taken on the part of the plaintiff; and, therefore, there would be no rule.

Rule refused.

(a) 7 Bing, 709.

1834.

The KING *against* The Inhabitants of St. *Saturday,*
CUTHBERT, WELLS. *Jan. 18th.*

ON appeal against an order of two justices, whereby

John Ivey was removed from the parish of *St. Simon and St. Jude*, in the city and county of the city of *Norwich*, to the *In-parish* of *St. Cuthbert*, in the city of *Wells*, in the county of *Somerset* : the sessions confirmed the order, subject to the opinion of this Court on the following case : —

The respondents sought to establish the settlement of the pauper in the appellant parish, as derived from his father, *John Ivey*, who had been placed out as an apprentice by the parish officers of *Ditcheat*. By the indenture (bearing date the 23d of *August* 1774) the churchwardens and overseers of *Ditcheat*, with the assent of two justices, whose names were subscribed to the indenture, put and placed *John Ivey*, about eight years of age, a poor child of the said parish, apprentice to *Mr. Edward Powell*, for and in respect of *Mr. William Wilmot*, his estate, with him to dwell and serve from the date of the indenture until he should accomplish his full age of twenty-four years; there was a covenant by *Powell* to teach *Ivey* the art and business of husbandry, and the indenture appeared to be executed by one churchwarden and one overseer, and by *Wilmot*. *Powell* was a farmer, and the tenant of a farm at *Ditcheat*, the property of *Wilmot*, who was a stocking-maker residing at *Wraxhall*, in *Ditcheat*, but who afterwards lived in the appellant parish, where

On special case, the sessions found that *J. E.* by indenture in 1774, was put apprentice to *P.* for and in respect of *W.*'s estate; and there was a covenant by *P.* to teach *J. E.* the business of husbandry. The indenture was executed by the parish officers and *W.* *P.* was a farmer and tenant to *W.*, who was a stocking-weaver. *J. E.* never served *P.*, but lived with *W.* long enough to gain a settlement by apprenticeship, if he could acquire one by such service. The sessions not having found that *P.* ever executed the indenture, or assigned the apprentice to, or assented to his service with *W.*, it was held, that a settlement by apprenticeship was not proved.

John

1834.

—
 The King
 against
 The Inhabit-
 ants of
 St. Cuthbert,
 Wells.

John Ivey, the pauper's father, lived with him, and was employed as a stocking-weaver. *John Ivey*, at the time he was bound, was living with his sister, *Mrs. Ward*, in *Ditcheat*. It was not proved that he went to *Powell's*, and *Mrs. Ward* knew nothing about *Powell*. Under the directions of the parish officers of *Ditcheat*, she took her brother to *Wilmot*, then residing at *Wraxhall*, in *Ditcheat*. When she first took him, *Wilmot* said he was not quite ready for him, and she, at his request, kept her brother for a quarter of a year, *Wilmot* paying for his board. After that time *Wilmot* sent for him, and the boy went and lived with him, first at *Wraxhall*, in *Ditcheat*, and afterwards in the appellant parish, for a sufficient length of time to give him a settlement by apprenticeship, if the settlement could be acquired by such service.

Austin in support of the order of sessions. *Holy Trinity v. Shoreditch* (a) is in point. There *Ferrer* was bound apprentice to *Truby*, with intent that he should serve *Green*, which he did for three years in *Shoreditch*; and the Court were of opinion that *Ferrer* gained a settlement in *Shoreditch*, and said, that it was the same thing as if *Truby* had turned him over to *Green*. So in *All-Hallows-on-the-Wall v. St. Olave in Surrey* (b), an apprentice was bound to *A.* in one parish, but by agreement served *B.* in another; and it was held that he gained a settlement in *B.*'s parish. In *Re v. Whitchurch* (c), this Court seemed to think that there must be an actual consent of the first master to the particular

(a) 1 Str. 10. And see 8 Mod. 169.

(b) 1 Str. 554. 8 Mod. 168.

(c) 1 B. & C. 574.

service

service with the second, and a knowledge of the latter that the service was in the character of apprentice. Here the consent of *Powell*, the first master, to the service with *Wilmot*, ought to be presumed after a lapse of sixty years; and *Wilmot* must have known that the pauper was an apprentice; for he, *Wilmot*, was one of the parties named in the indenture, and *Powell* was his tenant. It is clear that an unwritten consent to the second service was good; *St. Olave v. All-Hallows*. (a)

1884.

—
The King
against
The Inhabit-
ants of
St. Cuthbert,
Wells.

Biggs Andrews, and *Palmer*, contra. There was no binding to *Wilmot*, and it does not appear that *Powell* ever assigned the apprentice to, or assented to his service with *Wilmot*. The pauper was bound to *Powell*, and covenanted to serve him; and *Powell* covenanted to teach him the art and business of husbandry. This was a binding out of a parish apprentice, to which the consent of justices was necessary, and they signed an allowance of an indenture, whereby the pauper was bound to *Powell* and not to *Wilmot*. [*Denman C. J.* It does not appear that any master was bound by this indenture; it is stated merely that the original was signed by the parish officers and the pauper. *Powell* does not appear to have signed it. [*Patteson J.* There is no statement in the case to shew that *Powell* knew any thing of the transaction.]

DENMAN C. J. There ought to have been a positive finding by the sessions of every essential fact. It is not found here that *Powell* ever assigned the apprentice to

(a) 8 Mod. 168.

1834. *Wilmot*, or consented to his serving him. The order must be quashed.

The King
against
The Inhabit-
ants of
St. Cuthbert,
Wells.

LITLEDALE, TAUNTON, and PATTESON Js. con-
curred.

Order of sessions quashed.

Saturday,
Jan. 18th.

The KING *against* The Inhabitants of BISHOP
WEARMOUTH.

The parish of *Bishop Wearmouth* has no overseers of the poor, but contains several townships separately maintaining their own poor, and having distinct overseers. Two of these townships are called *Bishop Wearmouth* and *Bishop Wearmouth Panns*. Paupers, whose settle-ment was in *Bishop Wearmouth Panns*, were, by an order of justices, directed to be removed to the parish of *Bishop Wearmouth*. The order was served on the overseer of *Bishop Wearmouth Panns*, who refused to receive the paupers (on the ground that that township was not named in the order), unless certain expenses were waived. This being refused, the paupers were taken away. The removing parish afterwards served the churchwarden of the whole parish of *Bishop Wearmouth* with the order, and delivered the paupers to him. The latter took the paupers to the workhouse of *Bishop Wearmouth* township, where they were maintained:

ON an appeal by the township of *Bishop Wearmouth* against an order directed to the churchwardens and overseers of the poor of the township of *Botchergate*, in the parish of *St. Cuthbert, Carlisle*, in the county of *Cumberland*, and to the churchwardens and overseers of the poor of the parish of *Bishop Wearmouth* in the county of *Durham*, and to each and every of them, for the removal of a pauper and his family from the township of *Botchergate* to the said parish of *Bishop Wearmouth*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The order of removal was made on the 28th of *March* 1829, and the execution of it duly suspended; the suspension was taken off on the 12th of *September* 1829,

Held, by *Dennis* C. J. and *Little* J., *Taunton*, and *Patteson* Js. *dubitantibus*, that the inhabitants of the township of *Bishop Wearmouth*, although they were not bound to maintain the pauper under the order, had reasonable ground for thinking that they might be aggrieved by it, and, therefore, were entitled to appeal.

and

and a further order was then made by the magistrates on the churchwardens and overseers of the poor of the said parish of *Bishop Wearmouth* to pay the sum of 5*l.* 7*s.* 6*d.*, being the expense incurred by the suspension of the said order of removal, to *William Kidd* or *Luke Kidd*, upon demand, the said *Luke Kidd* being the overseer of the township of *Botchergate*, and father of the said *William Kidd*.

The parish of *Bishop Wearmouth* consists of seven townships, each maintaining its own poor separately, and having separate and distinct overseers. Two of these townships are called *Bishop Wearmouth* and *Bishop Wearmouth Panns* respectively; and in the latter the pauper and his family were legally settled. There are no overseers of the poor of the parish of *Bishop Wearmouth*. When the order of removal was made, both the magistrates who signed the same, and the overseers of the removing township, knew of the division of the parish of *Bishop Wearmouth* into townships, each maintaining its own poor, and that the pauper's settlement was in the township of *Bishop Wearmouth Panns*, though, in the order of removal, it was declared and adjudged by them to be in the parish of *Bishop Wearmouth*. The suspended order was not served till after the suspension was taken off; namely, on the 28th of *September* 1829. The pauper and his children were taken by *W. Kidd* from the removing township to the township of *Bishop Wearmouth Panns*, with directions from the overseer of *Botchergate* to serve the order on, and deliver the paupers to, the overseer of the township of *Bishop Wearmouth Panns*, and to demand from him 5*l.* 7*s.* 6*d.* *W. Kidd* accordingly, on the 28th of *September*, took the paupers to that

1834.

The KING
against
The Inhabit-
ants of
BISHOP
WEARMOUTH.

1834.

—
The KING
against
The Inhabit-
ants of
BISHOP
WEARMOUTH.

township, and saw the overseer there, to whom he delivered the order, and demanded from him the above sum. The overseer of *Bishop Wearmouth Panns* stated that he believed the settlement of the paupers was in his township; but as the order of removal was not directed to the overseers of that township, but to the churchwardens and overseers of the poor of the *parish* of *Bishop Wearmouth*, he objected to it on account of its informality. Ultimately, however, he agreed, in order to save further expense and trouble, as he had no doubt of the paupers belonging to that township, that he would waive the objections he had taken to the order, if the overseer of the removing township would consent not to call for the 5*l.* 7*s.* 6*d.* This proposal, however, not being acceded to, *W. Kidd* (to save expense) took the paupers to the workhouse of a neighbouring and distinct parish, leaving them as boarders; and returned home, taking with him the order of removal.

The paupers remained there till the 22d of *October* following, when *Luke Kidd*, the overseer of the removing township, having paid for their board, took them with the same order to the same overseer of *Bishop Wearmouth Panns*, as before, and again attempted to prevail upon him to accept the paupers and pay the money. This, however, he refused to do, for the same reasons he had before assigned, acknowledging, at the same time, that the paupers belonged to his township; whereupon *Luke Kidd* took the order to *Mr. W. Hills*, one of the churchwardens of the whole parish of *Bishop Wearmouth*, and who resided in the township of *Bishop Wearmouth*, and informed him of the refusal by the overseer of *Bishop Wearmouth Panns* to receive the paupers. *Mr. Hills*

accom-

accompanied *L. Kidd* to try to prevail on the overseer of *Bishop Wearmouth Panns* to take the paupers. They found him at his place of business, situate in a distant parish (*Sunderland*), but he still refusing to receive the paupers, *L. Kidd*, the overseer of the removing township, served Mr. *Hills*, the churchwarden of the whole parish of *Bishop Wearmouth*, with the removal order, *Hills* being then in the parish of *Sunderland*; and the paupers were lodged by him in the workhouse of *Bishop Wearmouth* township, and maintained by that township till the appeal was heard. It was objected by the counsel for the respondents, that the churchwardens and overseers of the township of *Bishop Wearmouth* had no right of appeal, and were not entitled to be heard; but the court of quarter sessions determined that they were parties aggrieved, and entitled to appeal. The questions for the opinion of this Court were, 1st, whether the township of *Bishop Wearmouth* was, under the circumstances, entitled to appeal; secondly, whether the order of removal, so directed and served as afore-said, was, notwithstanding the objection made to it at the time of such service, a good, valid, and binding order or not.

Aglionby in support of the order of sessions. The inhabitants of the township of *Bishop Wearmouth* had no right to appeal. The 13 & 14 Car. 2. c. 12., after authorizing two justices by their warrant to remove persons likely to become chargeable, to the parish where they are legally settled, gives, by sect. 2. the right of appeal to all persons who think themselves aggrieved by any such judgment of the two justices; and the 3 &

1834.

—
The KING
against
The Inhabit-
ants of
BISHOP
WEARMOUTH.

1834.

—
The King
against
The Inhabit-
ants of
Bishop
Wearmouth.

4 *W. & M. c.* 11. s. 9., gives it to any person who "shall find himself aggrieved" by any determination of the justices. Here, the inhabitants of the township of *Bishop Wearmouth* had no ground to think themselves aggrieved by the warrant or order of the justices. They are not mentioned in it. They could not have been compelled to receive the pauper. And, undoubtedly, they were not parties *actually aggrieved* by the determination of the justices. In *Rex v. Hartfield (a)*, it was determined that a party who is removed may appeal, as well as the parish. [*Dennan C. J.* The officers of the township of *Bishop Wearmouth*, when looking at the order, directing the removal to the parish of the same name, might, on the authority of *Spitalfields v. Bromley (b)*, have reasonable ground to think they would be fixed if they did not appeal. *Taunton J.* In *Rex v. Kirkby Stephen (c)*, an order was directed to a parish consisting of several townships, and served on one of the townships (of the same name as the parish) which maintained its own poor, and the Court held the order unappealed from, conclusive on the township.] There the officer of the removing parish took the pauper to the township. Here the paupers were not delivered by the officer of the removing parish to the overseers of the appellant township, nor was the order served on them. To give the right of appeal, the appellants must think themselves aggrieved by the judgment of the justices; here, it does not appear that the parish officers of the township of *Bishop Wearmouth* ever knew of any such judgment having been pronounced. The

(a) *Carthew*. 222. 2 *Boll.* pl. 940. 6th ed.

(b) 18 *Vin. Ab.* 468., tit. Removal, (H.) pl. 5.

(c) *Burr. S.C.* 664.

order

order was a good order on *Bishop Wearmouth Panns*, and was properly served on that township; the officers of that township were bound to receive the pauper, and if aggrieved by the order, they ought to have appealed against it; *Spitalfields v. Bromley* (a), *Rex v. Kirkby Stephen* (b). The paupers were settled in that township, and the magistrates knew that they were so settled. In *Rex v. Kirkby Stephen* (b), the intention was to remove to the township of *Kirkby Stephen*; the order was directed to the parish, but was delivered with the pauper to the township of *Kirkby Stephen*, which did not appeal; and it was held that the township was bound by the order. There, there did not exist such a place as the parish of *Kirkby Stephen* for the purpose of maintaining the poor; nor here does there exist such a place as the parish of *Bishop Wearmouth* for that purpose; but the order in this case was not served on officers of the township of *Bishop Wearmouth*, nor were the paupers delivered to them by officers of the removing parish; and the officer of *Bishop Wearmouth Panns*, to whom the order was first delivered, knew that the intention was to remove the paupers to that township.

Armstrong contra. If the order was properly served on *Hills*, the township of *Bishop Wearmouth* is aggrieved. It was properly served: the officer of the removing parish first took the paupers with the order to *Bishop Wearmouth Panns*, and then, after a refusal by the overseer of that township to receive them, to the churchwarden of the whole parish, who resided in the township of *Bishop Wearmouth*, and the latter was obliged to place them in

1834.

—
The King
against
The Inhabit-
ants of
BISHOP
WEARMOUTH.

(a) 18 Vin. Ab. 468., tit. Removal, (H.) pl. 5.

(b) Burr. S.C. 664.

1834.

The King
against
The Inhabitants of
BISHOP
WEARMOUTH,

the workhouse of that township. It is true, he was not an overseer of the township. [*Patteson J.* Then he was a mere stranger.] The removing parish treated him as an overseer. They abandoned their former service, and delivered the order to him. They are estopped from saying that the order was not properly served. [*Patteson J.* The object may have been to serve him as the representative of the whole parish.] The sessions were right in holding, that *Bishop Wearmouth* was entitled to appeal, but wrong in confirming the order of removal; because the settlement of the paupers was not in the parish of *Bishop Wearmouth*, but in the township of *Bishop Wearmouth Parva*.

DENMAN C. J. Great pains have been taken to perplex this case, by the magistrates, and the officers of the removing township. No doubt it was the duty of the magistrates when they ascertained that the parish was divided into townships, and the settlement of the paupers was in one of those township, to remove the paupers to the township bound to maintain them. If they had done so here there would be no dispute. But the order is to remove to the *parish of Bishop Wearmouth generally*, which, for the purpose of maintaining the poor, has no existence. Then the officer of the removing township sees the officer of the township, to which the removal ought to have been made, and the latter objects to receive the pauper, because the order is to remove to the parish, unless the former will waive some costs; he refuses to do so. The paupers are then taken to the churchwarden of the whole parish of *Bishop Wearmouth*. He was not overseer of the township of *Bishop Wearmouth*, and as far as that township is concerned

earned in the appeal, must be considered an entire stranger. He took the paupers with the order to another township which happens to be of the same name with the parish to which the removal was directed to be made. That township therefore had the paupers under an order directed to a parish of the same name: it was not bound to receive them, and was a volunteer to a certain extent; and the question is, whether it comes within the stat. 13 & 14 Car. 2. c. 2. s. 2, which gives the right of appeal to all persons who think themselves aggrieved by any judgment of the Justices. That clause as it seems to me ought not to be construed: so as to let in any one who, taking a capricious view of the order, may think himself aggrieved by it, when it is clear that he was not intended to be included in it, but must be confined to those who may have reasonable ground for thinking themselves aggrieved. I think, however, that there was in this case reasonable ground for the inhabitants of *Bishop Wearmouth* to think they might suffer by this order, whereby the paupers were directed to be removed to a parish of the same name as the township, and that, therefore, they had a right to appeal. They might have a reasonable apprehension that they would be fixed with the pauper if they did not appeal, and, consequently, might think themselves aggrieved by the order.

The appeal was heard, and the order of removal was confirmed on proof of a settlement in the township of *Bishop Wearmouth Parms*, the inhabitants of which, for the purpose of this appeal, must be considered as third persons. The sessions have clearly done wrong in this respect, and the order must be quashed.

1834.

The King
against
The Inhabit-
ants of
BISHOP
WEARMOUTH.

1834.

—
The King
against
The Inhabit-
ants of
Bishop
Wearmouth.

LITTLEDALE J. The order of sessions must evidently be quashed, because it confirms an order of removal to the parish of *Bishop Wearmouth*, and it appears clearly that the settlement of the pauper was in a township within the parish. It seems to me that the township of *Bishop Wearmouth* had a right to appeal. They had just reasons to apprehend that they would be fixed if they did not appeal. They therefore come within the words of the stat. 13 & 14 Car. 2. c. 12. s. 2. They had very good reason to think they might be injured by the order; for though the justices thereby directed the paupers to be removed to the parish of *Bishop Wearmouth*, the officers of the township of that name might suppose that the paupers must be maintained by some one of the townships within that parish, and that their township being of the same name as the parish, was the one intended by the justices. The order was not binding on *Bishop Wearmouth Panns*, because not directed to that township.

TAUNTON J. The order of sessions is wrong, because the paupers were settled in *Bishop Wearmouth Panns*, and it was intended to remove them thither; but the sessions have confirmed an order removing them to the parish of *Bishop Wearmouth*, which does not maintain its own poor. This is not a mere verbal mistake, as in *Rex v. Kirby Stephen (a)*, for the names of the parish and township are not the same, and the thing done was not according to the intention. But I have great doubt whether the inhabitants of the township of *Bishop Wear-*

(a) Burr. & C. 664.

month had reasonable cause to think themselves aggrieved. The statute does not give the right of appeal to every person, who, upon any inconsiderate view of his case, may think himself aggrieved, but only to persons 'who have reason to think themselves aggrieved. I am not satisfied that the appellant township would have been concluded by this order, if they had not appealed against it. It never had been served on the officers of that township, nor was it served by the officers of the removing township. My doubt, however, is not so serious as to make me differ from the rest of the Court.

1834.

—
The King
against
The Inhabit-
ants of
Bishop
Wearmouth.

PATTESON J. For the reasons already given, the sessions ought clearly to have quashed the order of removal. It is to be regretted that the magistrates should have ordered the paupers to be removed to a place where they were clearly not settled. *Spitalfields v. Bromley* (a) goes to this extent, that magistrates are not bound to notice the division of parishes into townships; and, therefore, if they do not know that a parish is so divided, and make an order directing a pauper to be removed to the parish, such an order may not be wrong. But if they are informed, before they make the order, that a parish is divided into townships maintaining their own poor separately, and that the settlement of the paupers is in one of those townships, it is their duty to direct the paupers to be removed to the township bound to maintain them. It seems to me also that the service of the order on the township of *Bishop Wearmouth* was not good. The order was directed to

(a) 18 *Vin. Ab.* 468., tit. Removal, (H.) pl. 5.

1834.

—
The KING
against
The Inhabit-
ants of
BISHOP
WEARMOUTH.

the churchwarden and overseers of the poor of the parish of *Bishop Wearmouth*, but there were no overseers of the poor of that parish. It was not served on the overseers of the township of *Bishop Wearmouth*, but of *Bishop Wearmouth Panns*. I doubt, therefore, whether the inhabitants of the township of *Bishop Wearmouth* had any right to appeal, because, not being bound to receive the paupers, they were, to a certain extent, volunteers. At the same time, as the order was served on the churchwarden of the parish, who was, in some respect, the representative of all the townships within it, and he, in fact, placed the paupers in the workhouse of the township, the officers of the latter may be considered as having received and maintained the paupers under the order, and may have thought it obligatory on them so to do, and, consequently, that the township might be aggrieved by it. I therefore yield on this point (though not without much doubt) to the opinion of my Lord and my Brother *Littledale*.

Order of sessions quashed.

1834.

The KING *against* The Inhabitants of
BUCKINGHAM.

Saturday,
Jan. 18th.

ON appeal against an order of two justices whereby *Thomas Burnell*, his wife and children, were removed from *Maidsmorton* to *Buckingham*, the sessions confirmed the order as to some of the paupers, subject to the opinion of this Court on the following case:—

The birth settlement of the pauper *Thomas Burnell* was in *Buckingham*. On the 28th of *February* 1828 he was hired by *Henry Smithson*, Esq. of *Maidsmorton* for a year, as a footman and groom, at the wages of 7*l.* and a suit of livery. On the following day he went into the service and continued until the 9th of *May* following. *Mr. Smithson*, being a *West India* planter, was about to visit his property in *Berbice*, and on the 9th of *May*, came to an agreement with the pauper whereby the latter engaged to bind himself to serve *Mr. S.* in *Berbice* as overseer and clerk, on his plantations, for the term of three years from the first day of his arrival in *Berbice*, at the salary, for the first year, of 15*l.*, for the second 20*l.*, for the third 30*l.* current money in *Berbice*, and *Mr. S.* promised to pay the above money as it became due, (the first named doing his duty,) and to find him his board and lodging, and doctors' charges, as is usual for overseers in *Berbice*. On the preceding day (*May*

Pauper was hired for a year as a footman and groom, by a *West India* planter, residing at *M.*, in *England*, at 7*l.* wages. He went into the master's service in *February* 1828, and in *May* following engaged to bind himself to serve the same master at *Berbice* as clerk and overseer for three years from the first day of his arrival there, at a certain salary. Soon after their arrival at *Berbice* the pauper entered on the office of overseer and clerk, but he also continued to act as servant, and lived in his master's house, and did so until the following *February*, when they returned to *England*, the

pauper acting in the capacity of servant on the homeward voyage and after his arrival in *England*. No further contract had ever been entered into for the pauper's service as overseer. The master paid him his footman's wages till the time of their going abroad, and, on their return home, paid him 30*l.* as salary for the service in *Berbice*; after which he gave him weekly wages, under a new agreement:

Held, that there was no dissolution of the first contract, and that the pauper having served forty days under the first hiring, gained a settlement in *M.*

8th)

1834.

The King
against
The Inhabit-
ants of
Buckingham.

8th) Mr. *Smithson* paid the pauper 1*l.* 16*s.* 9*d.* the amount of three months' wages.

The pauper continued with Mr. *Smithson* at *Maidsmorton* till the 12th of *May* and the same day went with him to *London*, where they continued until the 20th, when they embarked for *Berbice*. The pauper acted in the capacity of servant to Mr. *Smithson* during his stay in *England*, after he quitted *Maidsmorton*, and during the voyage. They arrived at *Berbice* on the 10th of *August* following. A few weeks after landing they remained at a friend's house, and the pauper lived with Mr. *S.* as servant, and they then proceeded to Mr. *Smithson's* plantation at *Berbice*. The pauper then entered into the office of overseer and clerk, and acted also as servant about the person of his master and lived in his master's house. This continued until *February* following (1829) when Mr. *Smithson* having declared his intention of returning to *England*, the pauper expressed his desire to return also. Mr. *Smithson* at first objected, but ultimately consented, and the pauper did accordingly accompany his master to *England*, acting in the capacity of his servant as on the outward voyage. They landed in *London* on the 10th of *May* 1829, and the pauper continued there until the 14th, when they returned to Mr. *Smithson's* residence at *Maidsmorton*, and the pauper continued to act as his servant in the house until the 1st of *June*, without any thing having passed as to hiring or terms of service. Three or four days before the 1st of *June*, Mr. *Smithson* told the pauper he meant to give him 20*l.* as his salary up to that time, of which he then gave 10*l.*, and promised him the remainder whenever he should want it. On the 1st of *June* the pauper was married, and the same day, previous

vious to the marriage taking place, Mr. *Smithson* and the pauper came to an agreement for the pauper's service as weekly servant at 4s. a week, to live and board in the house as before. Pauper continued in such service until the *September* following, and then left and received the remaining 10*l.*, his weekly wages having been regularly paid. The pauper was never absent from Mr. *Smithson's* service a day from its commencement in *February* 1828 to its determination in *September* 1829. The whole amount of wages received by the pauper for his service to *Smithson* was the sums of 1*l.* 16*s.* 9*d.*, 20*l.*, and the weekly wages.

The question for the opinion of this Court was, whether under the circumstances above stated, the pauper gained a settlement in *Maidsmorton*.

B. Monro in support of the order of sessions. The pauper did not gain a settlement in *Maidsmorton*: the contract of hiring of the 28th of *February* 1828, as footman and groom, was dissolved by the agreement of the 9th of *May*, whereby the pauper engaged to bind himself to serve his master as overseer and clerk in the plantations for three years; *Rex v. Great Chilton* (a) is in point. There, an unmarried man was hired for a year from *Martinmas*, as a servant in husbandry at 8*l.* a year, with meat, washing, and lodging. In the succeeding *January* he married, but continued with his master as a menial servant until the ensuing *May-day*, some days before which, the master and pauper agreed that the pauper should go (with his wife) as a hind, to reside on, and manage another farm of his master's in

1834.

The King
against
The Inhabit-
ants of
BUCKINGHAM.

(a) 5 T. R. 672.

1834.
 ———
 The King
 against
 The Inhabit-
 ants of
 BUCKINGHAM.

the same township. The second agreement was for a year from *May-day*; the pauper to have 5s. a week, with a house to live in rent free, and some perquisites. This was held by a majority of the Court not to be a prolongation of the former contract, but a new agreement to serve for a year from *May-day*, which put an end to the former, as being inconsistent with it. Lord *Kenyon*, who there differed from the rest of the Court, admitted that, if the nature of the service only were varied, that would not defeat the settlement, but he said it would be otherwise if there was a dissolution of the first contract. Here there was a dissolution of the first contract by the agreement of the 9th of *May*. [*Denman C. J.* How does it appear that the first contract was dissolved?] There is certainly no express dissolution, but the new contract was wholly inconsistent with the first; the service under the second agreement was to be in a foreign country; and the wages were to be different. If the master had brought an action on the first contract after the 9th of *May*, the agreement made on that day would have been an answer.

Biggs Andrews, contra, was stopped by the Court.

DENMAN C. J. The argument is, that the legal effect of the second agreement was to put an end to the first. I think not; and if not, then there were forty days' residence in *Maidsmorton* under the yearly hiring, and the pauper gained a settlement. The pauper's agreement of the 9th of *May* amounts only to an undertaking by him that, when he should go out to *Berbice*, he would bind himself to serve as clerk and overseer for three years from the day of his arrival there. It does
 not

not appear that he ever did so bind himself; and, though it is stated that, soon after his arrival at *Berbice*, he entered upon the office of overseer and clerk, yet he continued to act as servant about the person of his master, and lived in his master's house. The contract contemplated by the second agreement never came into operation.

1894.

The King
against
The Inhabit-
ants of
BUCKINGHAM.

LITLEDALE J. concurred.

TAUNTON J. It is said that the first contract was vacated by the second, and *Rex v. Great Chilton (a)* has been relied upon. Much as I respect the authority of Lord *Kenyon*, I should have concurred with the opinion of the majority of the Judges in that case. There, the pauper, having been hired for a year from *Martinmas*, agreed with his master to serve him for a year from the ensuing *May-day*, at weekly wages; the Court held, properly, that the two contracts were inconsistent, and that the latter put an end to the first. The latter contract, there, was not executory, but absolute, from a given day. But, here, the two contracts are not inconsistent: the pauper engages to bind himself to serve; he does not enter into an actual contract to serve, and it does not appear that any further contract was ever made between the parties. It is not immaterial that, during the whole period of service, he continued to act in his original character of servant. There is no decision to shew, where the service is clearly referable to a yearly hiring, that the master's going abroad, and the service afterwards being in a foreign country, destroys the settlement of the servant.

(a) 5 T. R. 672.

1834.

The KING
against
The Inhabit-
ants of
BUCKINGHAM.

PATTESON J. The sessions have found that the pauper continued to act as servant about the person of his master, and that he continued to do so till he came home. That could not be under the second contract, but must have been under the first.

Order of sessions quashed.

Saturday,
Jan. 18th.

The KING *against* The Inhabitants of OULTON.

A female, of full age, who lived with her father, and was the main support of his family, hired herself, with his consent and at his desire, to a farmer, in an adjoining parish, to work at weekly wages during his harvest; she worked for him under this hiring for three weeks; when she received her wages and returned home. In the following autumn she again hired herself to the same farmer, and served him for a fortnight and two days; and on her return home she gave her wages to her father, who expended them for the use of his family. On both these occasions she intended, and was expected by her father, to return home as soon as the harvest work was done. The court of quarter sessions having, upon these facts, found that the pauper was emancipated, held, by Denman C. J., Taunton and Patteson Jrs., Littledale J. dissentiente, that their decision was right.

ON an appeal against an order of two justices, whereby *Hannah Barnes* was removed from the parish of *Aikton*, to the township of *Oulton*, in the county of *Cumberland*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

John Barnes, the father of the pauper, had a settlement in the township of *Oulton* until the year 1830, when he acquired a settlement in the parish of *Aikton*, the pauper at that time living with him as part of his family. The pauper was born in 1806; she had never gained any settlement in her own right, but always, up to the time of the removal, lived with her father as part of his family. She did the work of her father's house, and before and at the time of the appeal was the main support of his family. In the autumn of 1829, the pauper then being of the age of twenty-three years, with the consent and at the desire of her father, hired herself to one *William Wilson*, residing at some miles' distance in an adjoining parish,

parish, at weekly wages, to work for him during his harvest. She remained living with *Wilson* and working for him under the hiring for three weeks and upwards; when she received her wages and returned home, having been absent from her father's house three weeks and two days. In the following autumn she hired herself again, with the consent and at the desire of her father, to *Wilson*, to assist him in his harvest. On this occasion she served *Wilson*, living with him under this hiring a fortnight, received her wages, and returned home as before, having been absent from her father's house at this time two weeks and two days. On this latter occasion she gave her wages to her father, who expended them for the use of the family. The pauper had not, on either of these occasions, any intention of abandoning her home, but on both occasions she fully intended to return; and her father expected that she would return to him as soon as the harvest work at *Wilson's* was done. The sessions, upon these facts, found that the pauper was emancipated, and did not follow the settlement acquired by her father in *Aikton* in 1830. The question for the opinion of this Court was, whether the sessions were warranted in the conclusion they had drawn, that, under such circumstances, the pauper was emancipated.

Armstrong, in support of the order of sessions. The sessions concluded rightly. The pauper, being of full age, contracted to work during the harvest, and, in performance of that contract, was absent, in one year, three weeks and two days from her father's house. During that period, she had subjected herself to the control of another, and could not return to, or become part of,

1834.

The King
against
The Inhabit-
ants of
OULTON.

1834.

—
The KING
against
The Inhabit-
ants of
OULTON.

her father's family. She thereby became severed from it. In *Rex v. Roach* (a), the daughter, after she was twenty-two years of age, left her father's house, and hired herself to a farmer as wet-nurse, and lived with him eight weeks; at the expiration of which time she returned to her father. It was held, that, having removed from her father's family when, in estimation of law, she wanted no further protection from the father, she could not afterwards be deemed part of that family for the purpose of a derivative settlement. It may be said that, here, the pauper when she quitted her father's house, intended to return, but that is immaterial, because, by her having contracted to serve during the harvest, it was out of her power to return till the harvest was got in. There was a period, therefore, during which, she being of age, was not under the parental control. *Rex v. Sowerby* (b) may be cited on the other side: there the question discussed was, whether the pauper's master, the son of a certificated person, had become emancipated. He always continued part of his father's or mother's family, and never left their house, except for a few weeks in harvest time in one year; and it did not appear that there was any contract of hiring, or if any, upon what terms. At all events, it was, in this case, a question of fact for the sessions, whether the absence of the daughter from the father's house for three weeks and two days the first year, and for a shorter time in the second, in execution of a contract voluntarily entered into by her, amounted to a severance from the father's family; and they having found, in effect, that it did, and there being premises to warrant that conclusion, this Court will not disturb their decision.

(a) 6 T. R. 247.

(b) 2 East, 276.

Aglionby contra. The pauper was not emancipated, because, by hiring herself for the harvest, she did not become, or intend to become, permanently free from her father's control. In *Rex v. Rotherfield Greys (a)*, *Bayley J.* says, "In order to constitute emancipation, the party ought to be wholly and *permanently* free from the parental control;" and in *Rex v. Hardwick (b)*, *Abbott C. J.* says, that "during the minority of a child, he will remain, almost under any circumstances, unemancipated; but, where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated, unless, in fact, the child continues part of the family. When, therefore, at that period, he is absent, employed in gaining a livelihood for himself, or serving in the militia, he no longer remains a member of the family." *Abbott C. J.*, there, is evidently speaking of an absence likely to be permanent. Here, the pauper, who had hired herself to work during the harvest only, cannot be said to have been *getting a living for herself* in the sense in which that expression is used by *Abbott C. J.* She continued part of her father's family during the whole time she served *Wilson*: she always intended to return. Her absence during the harvest, taken in conjunction with that intention, cannot be considered a severance from her father's family. *Rex v. Sowerby (c)* is in point. The principal question there discussed was, whether the master was emancipated. He was the son of a certificated man, and continued to reside in the certificated parish with his father in his lifetime; and after his father's death, with his mother; and never left them, except for a few weeks in

1834.

The King
against
The Inhabit-
ants of
OULSON.

(a) 1 B. & C. 347.

(b) 5 B. & A. 178.

(c) 2 East, 276.

1834.

—
The King
against
The Inhabit-
ants of
Oulston.

harvest time in one year. After he was of age, he carried on business for himself as a twine spinner, living with his mother in a house rented by her, and hired the pauper for a year; and it was held that the master was not emancipated. And *Grose J.* said, "there is no pretence for saying that his going out for a few weeks at harvest time would operate as an emancipation." Here, the pauper's leaving her father during the harvest, intending to return as soon as it was over, was not a severance from his family. In *Rex v. Roach (a)*, *Grose J.* says, "Whether, in a particular case, the leaving of the father's family amount to a severance of the child from the parents, is more a question of fact than of law, it depending on *intention*. Strictly speaking, the sessions should have found that fact." Now, here, the sessions have expressly found that the pauper had not, on either of the occasions when she hired herself, any intention of abandoning her home; but that, on both occasions, she fully intended to return, and her father expected that she would return to him as soon as the harvest work was done. No such intention was found in *Rex v. Roach (a)*; which distinguishes that case from the present.

DENMAN C. J. It seems to me that the sessions were right in finding that the daughter was emancipated. It appears that she and her father were on very good terms, and that on one occasion she paid her wages to him; but she being twenty-one years of age, and having hired herself during the harvest, it was in her option to pay her wages to her father or not. *Rex v. Lytchet*

(a) 6 T. R. 254.

Matraverse (a) tends strongly to shew that a pauper, who hires himself under twenty-one years of age, and continues to serve after that period, will be emancipated. We are extremely anxious to make the rules on this subject as clear as possible. A party under age is not considered to be emancipated unless some distinct act be shewn, producing that effect; as if he marries, and so becomes the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental control; but, where a child has attained the age of twenty-one, and is then separated from the father's family, the burden of proof that the child is not thereby emancipated, lies on the party asserting that fact. In *Rex v. Hardwick* (b), *Abbott C. J.* says. (His Lordship here read the words of *Abbott C. J.*, already cited, p. 961, antè.) Now here the pauper, after she attained twenty-one, made a contract whereby she bound herself to work during a certain period. In performance of that contract, she was absent from her father's house three weeks, employed in gaining a livelihood for herself. During that period, consequently, she no longer remained a member of his family: and I am, therefore, of opinion that the sessions were warranted in the conclusion they came to, that she was emancipated.

LITLEDALE J. I am of opinion that the pauper was not emancipated. It appears to me that her temporary absence from her father's house, during the harvest, was not, under the circumstances stated in this case, a severance from his family, and therefore does not amount to emancipation. It is the common prac-

1834.

The King
against
The Inhabit-
ants of
OULTON.

(a) 7 B. & C. 226.

(b) 5 B. & A. 178.

1884.

The King
against
The Inhabitants of
QULTON.

tice for country people to hire themselves during the harvest; and their temporary absence from home under such a hiring, and when they are of full age, has never been considered such a severance from the father's family as amounts to emancipation. In this case, the daughter did not intend to separate from her father's family; and her intention is very material in a case like the present, where her absence from the parent was for so short a period. For any thing that appears, her room or her bed may have been kept for her during her absence. She maintained her father; and her hiring herself during the harvest may have been intended as a means of making her earn something towards his support. It is said that the pauper is emancipated, because, having contracted to work during the harvest, she had, for a time, put herself out of her father's control. That argument would equally apply if she had agreed to work by the day; because, during the hours of work, she would be free from her father's control. There must be a severance of the child from the family of the parent to constitute emancipation. I think that the pauper, here, during the harvest time, while she was working for another, continued, under the circumstances stated in this case, part of her father's family. In *Rex v. Roach (a)*, Lord *Kenyon* said, "This woman" (the pauper) "was above the age of twenty-one: she had contracted the relation of *servant* with another family; she was out of her father's family; she was under no other control to him than that arising from moral obligation and gratitude, and I cannot see how she could afterwards be deemed to be incorporated

(a) 6 T. R. 247.

with

with the father's family." In this case, the pauper never contracted the relation of household servant with another family; she was to work in the fields, not in the house. She was, therefore, never out of her father's family, to use Lord *Kenyon's* expression; her wages contributed to his support; she intended to return home, and her father expected she would as soon as the harvest work was done. In *Rex v. Roach (a)*, *Ashurst J.* considered the question, whether absence from the father's family amounted to emancipation, to depend upon the intent. He there says, "In some cases, perhaps, it may be difficult to say what shall amount to a severance from the father's family. When a child becomes of age, it is optional in him, either to continue with his parents or not, as he pleases. He is then sui juris: and if he leave his father's house and put himself under some other control, this is a kind of public notification that he *means* to leave his father's family." Now, I think here, that the fact of the pauper having left her father's house, and put herself under the control of another during the harvest, was not, under the circumstances of the case, any indication of an intent to leave her father's family. In *Rex v. Sowerby (b)*, it was found that the son of the certificated person never left his father or mother's house, except for a few weeks in harvest time in one year; and it was there considered, that he was not thereby emancipated.

TAUNTON J. Certainty in the administration of every department of the law is of the greatest importance, and in none more so than in sessions law. The

1834.

The King
against
The Inhabit-
ants of
Oulton.

(a) 6 T. R. 247.

(b) 2 East, 276.

1834.

The King
against
The Inhabit-
ants of
OULTON.

yearly expense of the country is increased greatly by splitting hairs in questions of this description. I cannot distinguish this case from *Rex v. Roach (a)*. That decision, whether wisely come to or not, is binding on us. It certainly is not in contravention of any leading principles of law: if it were, I might think it right to reconsider it. It is true that, in this case, the pauper hired herself at the desire and with the consent of her father; but every parent consents and desires (if his mind be properly constituted) that his children should go to service to obtain an honest livelihood. Here the pauper agreed not merely to do harvest work, but to work for *Wilson* during his harvest. It is by no means uncommon for farmers to employ their own domestic servants to do the harvest work, and to hire others to do the household work. Whether that was the case here does not appear: but the pauper lived with her master during the whole harvest time, and slept in his house; and she was absent, on the first occasion, three weeks and two days. And as it is expressly found that, on the second occasion, she gave her wages to her father, it may be fairly inferred that, on the first, she kept them for herself. Then, the only difference between *Rex v. Roach (a)* and this case is, that there the pauper served eight weeks, here only three weeks and two days. In each case, the pauper served under a contract; and as it was held in the former case that the pauper was emancipated by having been absent from his father's family eight weeks, I think we are bound to adhere to that decision, and to hold that the pauper was emancipated, here, by her absence for three weeks.

(a) 6 T. R. 247.

PATTESON J. I cannot distinguish this case from *Rex v. Roach*. (a) The only difference is, that, in that case, the pauper served eight weeks: here, she served three weeks and two days; but she was bound by her contract, and compellable, to serve her master during that period. It is found, indeed, that she hired herself with the consent and at the desire of her father; but he could not enforce or prevent her so doing, for she was of full age; and that being the case, the onus of shewing that she was not emancipated is thrown on that party who contends that she was not so. As to *Rex v. Sowerby* (b), the decision there did not turn on the question of the emancipation of the son; he was born after the father had come into the certificated parish, and always resided with him during his lifetime, and, after his death, with his mother; and the question was, whether or not, after that time, he still resided under the certificate, by living with his mother as part of a family of which she was the head; in which case his hired servant was prevented by the statute 12 *Anne* c. 18. s. 2. from gaining a settlement.

Order of sessions confirmed.

(a) 6 *T. R.* 247.

(b) 2 *East*, 276.

1834.

—
The King
against
The Inhabit-
ants of
OULTON.

1854.

Saturday,
Jan. 18th.

The KING against The Inhabitants of
LUBBENHAM.

Appellants against an order of removal, to establish a birth settlement, proved, 1st, the marriage of the father and mother at *K.* in April 1749; and, 2dly, the baptism at *K.* of their four children, viz. a daughter, *M.*, in May 1751; a son, *J.*, in May 1753; a daughter, *Elizabeth*, in January 1755; and another daughter, *S.*, in December, 1756: Held, that the sessions were not bound to infer from this evidence that *Elizabeth* was born at *K.*

ON an appeal against an order removing *Elizabeth Wylly* and her children from the parish of *Lutterworth*, in the county of *Leicester*, to the parish of *Lubbenham*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The respondents proved that the pauper, before her marriage with *Alexander Benjamin Wylly*, gained a settlement in *Lubbenham*. The appellants gave the following evidence:—the marriage of *John Brittain* and *Mary Goode*, at *Ketton*, in the county of *Rutland*, on the 27th of April 1749; the baptism of *Mary* their daughter, at *Ketton*, on the 26th of May 1751; the baptism of *John* their son, at *Ketton*, on the 27th of May 1753; the baptism of *Elizabeth* their daughter, at *Ketton*, on the 19th of January 1755; and the baptism of *Susannah* their daughter, at *Ketton*, on the 25th of December 1756. They further proved the marriage of *Alexander Wylly*, a foreigner, who had no settlement, with the said *Elizabeth*, on the 18th of January 1779; and the birth from that marriage of *A. B. Wylly*, who afterwards married the pauper. The appellants thereupon submitted that they had shewn a birth settlement of *Elizabeth* in *Ketton*, which settlement devolved upon her son, and was by him communicated to the pauper. The respondents relied on *Rex v. North Petherton (a)*.

(a) 5 B. & C. 508.

Hildyard and Sir G. A. Lewin, in support of the order of sessions. The sessions have properly decided that the birth settlement of *Elizabeth Brittain* was not sufficiently proved. *Rex v. North Petherton (a)* shews that a register of baptism is not evidence per se of the place of birth of the party baptized. Here, it will be said, there is a series of registers shewing that different members of the family were baptized in the same place (the parish of *Ketton*), from which it ought to have been inferred that *Elizabeth Brittain* was born in that parish. But that is not a necessary inference; for the parents may have resided in an extraparochial place contiguous to *Ketton*, and have brought their children to that parish for baptism. It was for the sessions, at any rate, to draw the conclusion from the evidence; they were not bound to find that *Elizabeth* was born in *Ketton*.

1834.

—
The King
against
The Inhabit-
ants of
LUBBENHAM.

Humfrey and *White* contra. This case differs from *Rex v. North Petherton (a)*, as, besides the register of the baptism of *Elizabeth Brittain*, there were other circumstances connected with it from which the sessions ought to have inferred that she was born in *Ketton*; viz., the baptism of three other children in that parish.

DENMAN C. J. The question at sessions was, whether the birth settlement of *Elizabeth Brittain* was sufficiently proved. The Court of Quarter Sessions thought that it was not, and they have stated in the case the facts on which they came to that conclusion. We must collect that the question intended to be submitted to us was,

(a) 2 B. & C. 508.

whether

1884.

The King
against
The Inhabit-
ants of
LUBBENHAM.

whether they were bound to find that the pauper's mother was born in *Ketton*. I think they were not bound to come to any such conclusion. The order of sessions must therefore be confirmed.

LITLEDALE, TAUNTON, and PATTESON Js. concurred.

Order of sessions confirmed (a).

(a) In *Rex v. The Parish or Precinct of St. Katharine, near the Tower of London*, Hilary term 1851, the sessions confirmed an order for the removal of *Alexander Sharp* from *Knaresborough* to *St. Katharine's*, subject to the following case: — In the register of christenings for *St. Katharine's* was an entry, "1775, *Alexander Sharp*, of *John* and *Ann*." The pauper, on his examination, stated that he was about fifty-five years old, and came to *Knaresborough* to reside thirty-four years ago. He spelt his name *Sharp*; his father, who was a *German*, spelt it *Sharpe*. His father's name was *John Andrew*, his mother's *Ann*. Fifteen years ago he was removed by a vagrant pass, from *Chester* to *St. Katharine's*, in *London*, but could not say whether it was to the appellant parish; he was relieved there (but the relief, as such, was not relied upon by the respondent,) and he returned to *Knaresborough*, where he had been chargeable ever since. He had a sister, four years older than himself, who died in *London* many years ago. His mother died in *Derbyshire*, on her way to *London*. The question submitted by the sessions was, whether there was evidence from which they might presume a birth settlement in *St. Katharine's*. This Court held that there was *some* evidence from which the sessions might so presume.

Order confirmed.

J. L. Adolphus in support of the order of sessions.

Sir G. A. Lewin contrd.

1834.

The KING *against* The Inhabitants of GREAT *Saturday,*
Jan. 18th.
 WAKERING.

ON appeal against an order of two justices, whereby *Samuel Bullock*, his wife and children, were removed from the parish of *Great Waking* to the parish of *Great Wigborough*, both in the county of *Essex*, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The respondents having proved a derivative settlement in the appellant parish, the appellants endeavoured to establish a subsequent settlement acquired by the pauper, either by renting a tenement in the respondent parish, or by paying rates in respect thereof, under the following circumstances:—

By lease bearing date the 27th *February* 1827, made between *Catherine Summer*, widow, of the one part, and *Samuel Bullock* (the pauper), and *John Clay* of the other part, *Mrs. Summer*, in consideration of the rents and covenants on the behalf of *Bullock* and *Clay* to be paid and performed, leased to *Bullock* and *Clay* certain freehold premises (therein particularly described), situate in the respondent parish, to hold from the 25th of *March* then next, for fourteen years, if *Mrs. Summer* should so long live, at the yearly rent of 16*l.* The lease contained a covenant by *Bullock* and *Clay* for themselves jointly and severally, and their heirs, executors, administrators, and assigns, for payment of the taxes, rates, and assessments to be charged on the premises (but there was no covenant for payment of the rent); and, previous to the

A. by lease demised a house and land to *B.* and *C.* for a term of years, at 16*l.* per annum. There was a covenant by them jointly and severally to pay taxes, and rates, &c., but none to pay rent. *B.* occupied the whole premises, and paid the rent for five years: Held, that, the demise being joint, the rent was payable by the two jointly, and that each could only be considered as having rented a tenement at 8*l.* a year, and consequently that *B.* did not gain a settlement, either by renting the tenement, or by being rated and paying rates in respect of it.

1834.

—
The King
against
The Inhabit-
ants of
WARRING.

29th of *September* then next, to lay out 30*l.* in repairs on the premises, and to keep and leave the same in repair. It also contained a covenant by *Mrs. Summer*, with *Bullock* and *Clay*, to repay them the 30*l.*, in case they should be evicted by any person claiming lawful title. The lease was duly executed by all the parties.

Bullock (the pauper) was examined, and stated that he hired of *Mrs. Summer* the demised premises, and that they consisted of three cottages, two of which formed one double tenement, and an acre of land; that he occupied the whole under the lease, and paid the stipulated rent for above five years, inhabiting one of the cottages and cultivating the land, and under-letting the residue; that *Clay* never came near the premises during the five years, and never paid any part of the rent; but that he once lent the pauper some money to enable him to pay the rent then due. The appellants also put in evidence receipts, signed by *Mrs. Summer*, for rent, as paid by the pauper. Upon this evidence it was objected by the respondents, that the lease constituted a joint demise to *Bullock* and *Clay*, at the rent of 16*l.* a year, which was not sufficient to confer a settlement upon *Bullock* under the statute 6 G. 4. c. 57., the tenement act in force at the date of the demise. The appellants contended, that the liability to pay the reserved rent was in law several as well as joint, and they proposed to call *Mr. Murdoch*, the attorney who had prepared and attested the execution of the lease, and who had acted for all parties throughout the transaction, for the purpose of shewing that in fact *Clay* was not intended to be tenant jointly with *Bullock*, but that it was the intention of all parties that *Bullock* should

should be the only tenant, and responsible for the whole rent; and that *Clay* was included in the lease merely as a surety for the due payment of the rent by *Bullock*. The counsel for the respondents objected to *Murdoch's* evidence, as tending to contradict the language and vary the effect of the lease; but his evidence was admitted by the sessions, and was to the extent above stated. With respect to the settlement by payment of rates, the pauper proved that, once during his occupation under the lease, he paid a rate to one of the parish officers of *Great Waking*, and that he was rated for the premises in question, they being stated in the rate to be of the value of six pounds; and that *Clay* was not rated at all. The sessions were of opinion, that the pauper had acquired a settlement both by renting a tenement and by paying a rate in respect thereof; and quashed the order of removal.

1834.

The King
against
The Inhabit-
ants of
WAKING.

Knox and *Cripps* in support of the order of sessions. There was a hiring of a tenement by the pauper of sufficient value to satisfy the statute 6 G. 4. c. 57. In *Croft v. Gainford (a)*, and *Marden v. Barham (b)*, it was held, that where a tenement is occupied by two jointly, and is under 20*l.* a year value, neither can acquire a settlement; but those cases were decided at a time when it was considered necessary, in order to gain a settlement by renting a tenement, that a party should have credit for the rent, to the amount of 10*l.* a year. That doctrine, however, was exploded in *Rex v. Hooe (c)*, where the payment of the rent to the landlord was guaranteed by

(a) 2 *Bott.* pl. 194. 6th edit. and *Burr. S. C.* 511.

(b) 2 *Bott.* pl. 197. *Burr. S. C.* 511.

(c) 4 *East*, 362.

1834.

The King
against
The Inhabit-
ants of
WARRING.

another person; and there it was held to be sufficient if a party came to settle upon a tenement of the value of 10*l.* per annum, whether credit were given to him for the rent or not. Here the pauper was in the actual occupation of the whole premises for the term, and he was liable (by operation of law) severally for the whole rent; for the landlord, if he obtained judgment in an action against the two, might levy whole damages on one; the pauper has, therefore, satisfied the words of the statute 6 G. 4. c. 57., by settling upon or renting a tenement of 10*l.* a year. Secondly, the evidence of the attorney was admissible to shew that *Clay* was only surety, and not tenant; *Rex v. Scammonden (a)*, *Rex v. Laindon (b)*, *Rex v. Olney (c)*, 2 *Starkie on Evidence*, p. 1076.; the appellants were not parties, but strangers to the deed, and, therefore, not estopped by it; *Rex v. Cheadle (d)*. Thirdly, the pauper gained a settlement by being rated and paying the rates, for they were paid in respect of a tenement bonâ fide rented by him at 10*l.* a year. Besides, if the pauper is to be considered the tenant of one moiety to the original lessor, there is ample ground for presuming that he was a tenant of the other half to *Clay*; *Rex v. Duns Tew (e)*.

Bere, contra. It is quite clear that, before the late statutes, a tenement occupied by two jointly, under 20*l.* a year in value, did not confer a settlement upon either; and neither the statute 59 G. 3. c. 50., nor the statute 6 G. 4. c. 57., was intended to alter the law in that respect. In *Rex v. Tonbridge (g)*, *Bayley J.* in de-

(a) 3 T. R. 474.

(b) 8 T. R. 379.

(c) 1 M. & S. 387.

(d) 3 B. & Ad. 852.

(e) Burr. C. C. 398.

(g) 6 B. & C. 88.

livering

livering the judgment of the Court, seemed to consider that the first of those statutes had made no such alteration of the law. There the premises occupied by the pauper were not of sufficient value, unless he could be considered as sole occupier of a garden. The pauper took the garden, but it was agreed between him and one *Maynard* that they should share the expense and profit. *Maynard* paid the pauper half the rent, and *Bayley J.* observed, that although it was not stated that there was a joint occupation, yet it must be taken that there was, and if so, it must be considered that the pauper occupied only a moiety of the garden. Here the law will, from the joint demise to the two, imply a joint covenant for payment of the rent. As to the settlement by rates, the statute 6 G. 4. c. 57. requires the same circumstances to give a settlement by paying parochial rates, as by settling upon and renting a tenement; and, therefore, if a settlement was not gained here by renting a tenement, neither was it by the payment of rates.

DENMAN C. J. It appears to me that this letting did not confer a settlement, because it was a joint letting to two, and as the rent of 16*l.* would be payable by the two lessees, each would be liable only to pay a moiety. But in order to give a settlement, the tenement of each should be of the annual value of 10*l.* In *Rex v. Hooe (a)*, the demise was to one only, and his rent was guaranteed by another person, but the latter was not tenant. Whether the parol evidence be admissible or not, is immaterial; because, assuming it be receivable, the letting was in fact to the two jointly, and

1834.

The King
against
The Inhabit-
ants of
WARRING.

(a) 4 East, 362.

1834.

The KING
against
The Inhabit-
ants of
WAKKING.

the rent therefore payable by the two, and, consequently, neither rented to a sufficient amount. As to the other ground, that *Clay* may be considered as having let his moiety to the pauper, that is a fact not found by the sessions, and we cannot infer it.

LITLEDALE J. The demise being to two as joint tenants, each was entitled to occupy an undivided moiety in his own right. The pauper, therefore, if he occupied the whole, would occupy one half in his own right, and the other half as bailiff to *Clay*, and would be accountable to him for the profits. He therefore only occupied, in his own right, a tenement of 8*l.* a year value, which is not sufficient to give a settlement, either by renting, or by payment of rates.

TAUNTON J. The rule laid down by *Mr. Nolan* (vol. 2. p. 37.) is, that where a tenement is occupied by two jointly, and is of the value of 20*l.* a year, both may gain a settlement, for the moiety occupied by each is of the value of 10*l.* per annum; but where the tenement is occupied by two jointly, and is under 20*l.* per annum, neither can acquire one: and he adds, (from the case of *Croft v. Gainford* (a)) that “if the law were otherwise, the inconveniences arising from it would be intolerable; for if forty persons, for the same purpose, were to rent a tenement of this value, each of them would be entitled to a settlement; the manifest design of the statute would be thereby eluded, and the parishes would be loaded with poor.” Here, no settlement was gained, because the rent for the whole

(a) 2 *Bott.* pl. 194. 6th edit.

premises was only 16*l.* per annum, and it was payable by the lessees jointly; and supposing that the parol evidence was properly received, it does not vary the case; for, although it may have been intended that *Bullock* should be sole tenant, and *Clay* surety, still the demise by the lessor was to the two jointly, and the rent therefore was payable by them. There is no ground for saying that there was a settlement by rates; for that depends on the same circumstances, precisely, as a settlement by settling on or renting land.

1834.

The King
against
The Inhabit-
ants of
WAKKING.

PATTESON J. This is a joint lease to the two as regards the landlord. Whether the parol evidence was admissible as between the parties to this record is immaterial. I think it was admissible as between them, though it would not be so as between the parties to the instrument. All the authorities shew, that if there be a joint-tenancy, each of the parties should be interested to the amount of 10*l.* With respect to an underletting by *Clay* to the pauper, there were some circumstances to warrant such an inference; but the sessions have not drawn it, and we cannot.

Order of sessions quashed.

1834.

**The KING against The Trustees of the NORTH-
LEACH and WITNEY Roads.**

A local turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings; and that all persons should have access to such entries. By a subsequent local act it was directed, that the trustees should keep a book, in which they should enter their accounts, which book should be open to the inspection of the trustees, or of any creditor on the tolls. The general turnpike act, 3 G. 4. c. 126. s. 73., re-

A RULE had been obtained, calling on the trustees for repairing the *Oxfordshire* district of roads mentioned in an act of parliament, 24 G. 2. c. 28., and other subsequent acts, to shew cause why a mandamus should not issue, commanding them to permit and suffer Mr. *James Scarlett Price* to have recourse to the books containing their accounts and entries of monies collected, received, expended, and laid out, and their orders, acts, and other proceedings and things by them done in pursuance of the said acts, and in execution of the powers thereby given to them, at a reasonable and seasonable time in that behalf. The statute 24 G. 2. c. 28. directs that three books containing accounts respectively of the monies collected, laid out, &c., and of all orders, acts, matters, and things made or done by the trustees upon, in, or in respect of the three divisions into which the said roads are for that purpose distributed by the act, shall be kept as therein mentioned, "to which

enacted the latter provision as to all turnpike road accounts, and sect. 72. directed, that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts, as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where, by that act, it is otherwise ordered: .

Held, that these clauses of the general and of the second local act, superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors, in the respective cases of orders and accounts.

To ground an application for a mandamus to inspect books, quære, whether it is sufficient to shew that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favour, and that he refused to accept it otherwise than as a right. Per *Denman C. J.*

said

said three books *all persons* shall be at liberty to have recourse, and to inspect or peruse the same at all reasonable and seasonable times, without any fee or reward." The party making the present application, and certain other inhabitants of *Burford*, being advised that the said clause was still in force, gave notice to the trustees that they should attend at the office of the clerk, for the purpose of inspecting all orders, acts, matters, proceedings and things recorded or entered in the book or books which the act required the said trustees to keep for entering such orders, &c. in respect of the *Oxfordshire* division of the said roads. The parties attended accordingly, and the trustees offered to grant them the required inspection as a favour, but not as a matter of right. The applicants declined accepting it on these terms.

It appeared that by a statute, 1 & 2 G. 4. c. cix. (local and personal, public), relating (among other things) to the part of the above roads now in question, the former acts, except as varied, altered, or repealed by the present act, were kept in force as to these roads, subject to the amendments, variations, and additions in this act contained; and it was directed that the clerk to the trustees should keep a book or books, in which he should enter true accounts of all sums of money received and paid in each district respectively on account of the said roads, which book should, at all seasonable times, be open to the inspection of *the trustees, or any creditor or creditors* on the tolls, without fee or reward; and that they should be at liberty to take copies of, or extracts from the same; and a penalty was imposed on the clerk if he should refuse to permit, or should not permit *the*

1834.

—
The King
against
The Trustees
of the
NORTHLEACH
and WITNEY
Roads.

1834.

The KING
against
The Trustees
of the
NORTHLEACH
and WITNEY
Roads.

said trustees or such creditors, or any of them, to inspect such books, or take such copies, &c. Section 73. of the General Turnpike Act, 3 G. 4. c. 126., is, in every material point, precisely the same.

F. Pollock now shewed cause, and contended that the clause of 24 G. 2. c. 28. relied upon in support of the rule, was superseded by sects. 72. and 73. of the General Turnpike Act : that it was expressly altered, as to entries of accounts, by 1 G. 4. c. cix., if still in operation since the general act, or, at all events, by sect. 73. of the general act; and consequently, that a mandamus to permit persons who were neither trustees nor creditors to inspect the accounts as well as orders, could not be granted.

Talfourd Serjt. contrà. The clauses referred to in the statute of 1 G. 4. and sect. 73. of the general act, although they direct that inspection of the accounts shall be granted to trustees and creditors under a penalty, do not take away the right of inspection which the public had before. There are no words which repeal the former act in this respect. [*Taunton* J. If they are in direct opposition to the former clause, they must operate as a repeal of it, though it would not be so if there were a mere variation, and the several clauses were not inconsistent with each other.] There is nothing in the later acts that contravenes the clause in question in the former. Their provisions are more limited, but the peculiar right which they give to trustees and creditors is not inconsistent with the general right of the public.

DENMAN

DENMAN C. J. I think the parties are not entitled to this mandamus. The effect of sect. 4. (a) of the General Turnpike Act is to incorporate that statute with all particular acts; and therefore sections 72. (b) and 73. of the general act must be taken as part of 24 G. 2. c. 28.; and if they are inconsistent with the clause of that act relating to the accounts and orders, the latter must be considered as not continued; otherwise the very evil would ensue which that act was intended to prevent; namely, the want of uniformity in the laws regulating turnpike roads

1834.

The King
against
The Trustees
of the
NORTHKACH
and WITNEY
Roads.

(a) Sect. 4. " And whereas it is of great importance that one uniform system should be adhered to in the laws for regulating the management and maintenance of turnpike roads throughout the kingdom; be it therefore enacted, that from and after the 1st day of January 1823, all the enactments, provisions, matters, and things in this act contained, shall extend, and be deemed, construed, and taken to extend, to all acts of parliament now in force, and to all acts which shall hereafter be passed, for making, widening, turning, amending, repairing, or maintaining any turnpike road or roads in that part of *Great Britain* called *England*, save and except where any other commencement is particularly directed by this act; and as to such enactments, provisions, matters, and things as shall be expressly referred to, and varied, altered, or repealed by any such act or acts as shall be hereafter passed."

(b) Sect. 72. enacts, " That all orders and proceedings of the trustees or commissioners of every turnpike road, together with the names of the trustees or commissioners present at every meeting, shall be entered in a book or books to be kept by the clerk to the said trustees or commissioners for that purpose, and be signed by the chairman of the meeting or meetings at which such orders or proceedings shall be from time to time made or had; and that such book or books shall be open at all seasonable times to the inspection of any of the trustees or commissioners, without fee or reward; and such orders and proceedings so entered and signed by the chairman of such meeting or meetings as aforesaid, shall be deemed and taken to be original orders and proceedings; which said book or books, as well as the book or books in which the oath or affirmation directed to be taken by the said trustees or commissioners shall be entered, and also the book or books directed to be kept for registering mortgages and assignments, and all entries in such books respectively, shall and may be read in evidence in all courts whatsoever, in all cases of appeal, and in all prosecutions, suits, and actions whatsoever."

through-

1834.

—
 The KING
against
 The Trustees
 of the
 NORTHLEACH
 and WITNEY
 Roads.

throughout the kingdom. I also doubt, on another ground, whether a mandamus lies in this case. The books were offered on the application of the parties, as a matter of favour, not of right. It might be important to assert the right, but then the person who made the application might have said that he accepted the liberty of inspection as a right, not as a favour. If upon that the books had been withheld, a mandamus might have been applied for, supposing the parties had been in other respects entitled to it.

LITTTLEDALE J. The statute 1 G. 4. c. cix. declares that the former acts shall continue in full force, except as they are thereby varied, altered, or repealed; and in a subsequent clause it directs, that the trustees shall cause a book to be kept, in which shall be entered accounts of the monies received and disbursed, which book shall, at all seasonable times, be open to the inspection of the trustees, or any creditor or creditors on the tolls. The former act, 24 G. 2. c. 28., directed books to be kept containing accounts of all monies collected and expended, and of all orders, acts, matters, and things made and done upon, in, or in respect of the said roads, to which books all persons should be at liberty to have recourse. The act of 1 G. 4. varies this provision, as far as regards the entries in the books of monies received and expended, by varying the description of persons who are to have access to those entries. Before, all persons were to have access to the books; by this act a limitation was introduced. And I think the alteration is such as to render the original clause so far inoperative. But then there is a further provision in the statute of 24 G. 2., that the books shall
 contain

contain entries of all orders and acts made and done in respect of the roads, to which all persons may have recourse. If, however, the parties now applying wished to avail themselves of this part of the clause, they should have limited their motion to the entries of orders and acts. The clause of 24 G. 2. c. 28., referring to these, is not varied by 1 G. 4. c. cix.; but the clause of that act respecting the accounts has the effect of establishing two distinct provisions for the inspecting of receipts and disbursements, and of orders and other proceedings; and this distinction is supported by sects. 72. and 73. of the general act, which evidently subjects the two sets of books to different powers of inspection. The variation in this respect is reasonable in both statutes; creditors and trustees ought to be enabled to inspect the accounts, but there is no reason that all persons should. I agree with my Lord and my Brother *Taunton*, that the act 3 G. 4. c. 126. has done away with this general power; and, upon the construction of that, and of the two local statutes, I am of opinion that the rule ought to be discharged.

TAUNTON J. Supposing that the parties applying for this mandamus are entitled to it upon the statement made by them, as to which it is unnecessary to say any thing, I think the act 3 G. 4. c. 126. takes away the general power of inspecting accounts, given by 24 G. 2. c. 28., because the provisions of the two statutes cannot stand together.

PATTESON J. As to the inspection of accounts, the provisions of the General Turnpike Act, and of the last local act, are the same. As to inspecting the orders and
pro-

1834.

The KING
against
The Trustees
of the
NORTHLEACH
and WITNEY
Roads.

1834.

—
The KING
against
The Trustees
of the
NORTHLEACH
and WITNEY
Roads.

proceedings, the latter act makes no regulation ; therefore, the entries, as far as they relate to these, are subject to the general act ; and in any view of the case, a claim for all persons to inspect the books cannot be supported.

Rule discharged.

Tuesday,
Jan. 21st.

The KING against ALLEN, Gent.

A rule nisi was granted for a mandamus to the Principal of *Clifford's Inn*, to attend the benchers of the *Inner Temple*, and produce the records and regulations of the society of *Clifford's Inn*, to enable the benchers to decide on the validity of his election to that office.

But on cause shewn, the rule was discharged, no sufficient proof appearing, that the benchers of the *Inner Temple* had a compulsory authority over *Clifford's Inn* for this purpose.

A RULE was obtained in last *Michaelmas* term, calling on *William Henry Allen*, gentleman, an attorney of this Court, to shew cause why a mandamus should not issue, commanding him to attend before the masters of the bench of the *Inner Temple* on such day as they might appoint, and to take with him the rules and regulations of the Honourable Society of *Clifford's Inn*, to enable the said masters of the bench to decide upon the validity of his election to the office of principal of that society. The application was made under the following circumstances : —

John Symson Jessopp, Esq., barrister at law, one of the ancients or rulers of the society of *Clifford's Inn*, in *Trinity* term last presented a memorial to the benchers of the *Inner Temple*, stating : That *Clifford's Inn* is one of the most ancient inns of Chancery, and has, from the earliest period, been subordinate to the benchers of the *Inner Temple* ; that it is governed by a principal and twelve ancients or rulers ; that in *May* last a meeting of the rulers and fellows of *Clifford's Inn* was holden, for the purpose of electing a principal from among the rulers ; that the petitioner and Mr. *Allen* were candidates ;

dates; that the petitioner gave notice that Mr. *Allen* was not qualified to hold the office; but that the election notwithstanding proceeded, and Mr. *Allen* was declared to have the majority of votes, though he was, in fact, not qualified according to the rules of the society, for several reasons, which were stated in the memorial. To shew the authority of the benchers of the *Inner Temple* to interfere in this case, the memorial referred to the following passage in *Dugdale's Origines Judiciales*, chap. 70. (under the head, "Orders necessary for the government of the inns of court, &c. 1574"):—"The reformation and order for the inns of Chancery, is referred to the consideration of the benchers of the houses of court to which they are belonging."—p. 312. Also the following words from the same work, chap. 72.:—"That the inns of Chancery shall hold their government subordinate to the benchers of every of the inns of court to which they belong; and that the benchers of every inn of court make laws for governing them."—p. 322. It was further stated in the memorial, that an exercise of the power of deciding between conflicting claims of candidates for the office of principal of *Clifford's Inn* appeared among the records of the society of the *Inner Temple* in July 1677, when the election of one *Richard Graham* was confirmed by the benchers of the latter society, and his competitor, one *Summers*, was directed to deliver up to him the books, records, &c. of the society of *Clifford's Inn*, with which direction it appeared, by the records of *Clifford's Inn*, that *Summers* complied. This memorial was taken into consideration by the benchers of the *Inner Temple*, who appointed a day for hearing Mr. *Jessopp* on the subject of the election, and summoned Mr. *Allen* to attend on that day, as well

1834.

The King
against
ALLEN.

1834.

The KING
against
ALLEN.

as the steward of *Clifford's Inn* with the records of that society. Mr. *Allen* refused to attend, or to produce the records, which were in his custody; and the benchers, consequently, declined to proceed in the case, but stated to Mr. *Jessopp*, that they were willing to resume the subject in the ensuing *Michaelmas* term, if he thought proper to apply to them in that term for a further order upon Mr. *Allen*.

In *Michaelmas* term Mr. *Jessopp*, without having made such application, moved this Court for a mandamus to Mr. *Allen* to appear before the benchers of the *Inner Temple*, in order that they might decide upon his qualification. The Court thought that Mr. *Jessopp* ought, before moving for a mandamus, to apply to the benchers, according to their suggestion, for a further order upon Mr. *Allen*, and to try the effect of such order. The application was made, and an order thereupon issued by the benchers, that Mr. *Allen* should, at a time named, attend them, and produce the books and regulations of *Clifford's Inn*. The order was duly served: Mr. *Jessopp* attended at the time named, but Mr. *Allen* refused to do so; the rules and regulations were not produced; and the benchers, under these circumstances, declined proceeding upon Mr. *Jessopp's* application. The present rule nisi was then moved for, and granted.

Mr. *Allen's* affidavit, in opposition to the rule, contained various statements in answer to those of Mr. *Jessopp*, upon the merits of the election. It further stated, that the deponent did not attend upon the summonses of the benchers of the *Inner Temple*, because he believed and was advised that they had no jurisdiction to interfere in the management and controul of the society of
Clifford's

Clifford's Inn, except by the voluntary assent of both societies, or when chosen to be referees by the disputing parties; that the deponent never heard of any claim or exercise of such jurisdiction, or of the case referred to in Mr. *Jessopp's* memorial, and that no account of such case was to be found in the books of the society of *Clifford's Inn*; that he understood and believed that society to be of earlier origin than the society of the *Inner Temple*, and never to have been in any way subservient thereto; that he had been informed and believed, that the society of the *Inner Temple* had never desired or claimed, and did not then desire or claim, to exercise any jurisdiction over *Clifford's Inn*; and that he also believed, that the society of the *Inner Temple* had no means to enforce any rule or order against the society of *Clifford's Inn*, or against any other persons not members of their own body.

1834.

THE KING
against
ALLEN.

Follett in this term (*January 21st*) shewed cause. No authority or case has been cited, which goes the length of proving that the society of the *Inner Temple* has, in point of right, the power now contended for, or has, in fact, exercised such a power. And if an instance could be given in which that power had been exerted, it is clear, upon principle, that the Court cannot issue a mandamus to one voluntary society to attend upon another, and comply with its orders. The Court then called upon

Jessopp contra. The authorities given in the affidavit in support of the rule establish the power contended for. [*Littledale J.* It does not appear that the benchers of the *Inner Temple* themselves come forward to assert it.] They directed the parties to attend them, for the purpose
of

1834.

THE KING
against
ALLEN.

of deciding the point in dispute, and they made a formal order on Mr. *Allen* to produce the records and rules of *Clifford's Inn*. [Sir *James Scarlett*, as a bencher of the *Inner Temple*, here stated, that that society did not intend, by the steps which they had taken, to give an opinion upon the point of jurisdiction, but only to put Mr. *Jessopp* into such a course of proceeding as would enable him to bring his case before this court.] The passages cited in the memorial, from *Dugdale*, shew what was the opinion on the subject in his time. [*Littledale J.* We cannot notice them, unless he refers to authorities.] The case of Mr. *Graham*, stated on the memorial, is an instance in which the power contended for was exercised by the *Inner Temple*. [*Denman C. J.* The parties there may have consented to the exercise of jurisdiction. We do not know that the proceeding was in invitum. We ought to see, by the roll itself, that it was of that nature, and that, upon such proceeding, the one party was rejected for unfitness, and the other declared to be elected.] Mr. *Allen* denies that there is any account of the case in the records of *Clifford's Inn*, but he withholds the books by which the fact might be ascertained. The question is, whether the benchers have done wrong in taking the memorial into consideration, or Mr. *Allen* in disobeying their order. No ground is stated in his affidavit, for disputing the jurisdiction, except his own information and belief.

DENMAN C. J. If any example had been produced of an exercise of the authority in question by the benchers of the *Inner Temple*, we might perhaps have granted this mandamus, to put the subject into a course of enquiry. But no instance has been given. It does not appear that any principal of *Clifford's Inn* has ever been called

called upon by the *authority* of the benchers to shew before them that he was a proper person for the office, or properly elected. There might perhaps be other objections stated, but this is decisive. Before we call upon this party to submit his title to examination, it ought to be shewn that the persons who are to examine have authority to do something with respect to the election. But on this point nothing appears. I do not think it is correct to say that a question arises whether the benchers have done wrong in calling upon Mr. *Allen* to come before them, because it appears that that was only done to give Mr. *Jessopp* an opportunity of putting the matter in such a train that it might be brought before this court. Without throwing the slightest censure on those gentlemen, we may discharge the rule, upon the ground that the requisite authority has not been proved.

1834.

The King
against
ALLEN.

LITLEDALE J. No doubt this Court will take notice, in a general way, that the society of the *Inner Temple* exercises a jurisdiction over the Inn of Chancery called *Clifford's Inn*; but to grant a mandamus for the particular purpose now suggested, we should have evidence that the benchers of the *Inner Temple* have before exercised the authority which we are called upon to put in motion. They have a general superintendence over the Inn, but we cannot say that it enables them to decide this matter.

TAUNTON J. I cannot find, by any thing we have heard, that the benchers of the *Inner Temple* have the authority which has been ascribed to them; and we ought not to grant this mandamus, when it may appear that there is no jurisdiction to do what is required.

1834. PATTESON J. The instance referred to by Mr. *Jessopp* is not one in which the benchers of the *Inner Temple* are supposed to have exercised an authority to compel any thing to be done; it merely appears that they decided some question when it was brought before them. We ought at least to have had one instance in which an authority of this kind was exercised by them compulsorily. The rule must, therefore, be discharged.

The KING
against
ALLEN.

Rule discharged.

The KING *against* The Justices of NORFOLK.

A resolution of a court of quarter sessions, that whenever an appeal against an order of removal shall be entered and respited, notice thereof shall, within one month after such entry and respite, be given to the officers of the removing parish, is void, and where the Court of quarter sessions had dismissed an appeal for want of such notice, this Court granted a mandamus to them to hear it.

AN appeal of the churchwardens and overseers of the poor of the parish of *Swardeston*, in the county of *Norfolk*, against an order for the removal of *G. Fowler*, his wife and children, from the parish of *Trowse Newton* in the same county, to *Swardeston*, was entered at the *January* sessions for that county and respited until the *April* sessions. Before the *April* sessions, fifteen days' notice of trial was given by the appellant parish. It was objected by the respondents, that no notice of the entry and respite of the appeal had been given as required by a rule of the court of quarter sessions, whereby it was resolved that, whenever an appeal against an order of removal should be entered and respited, notice thereof should, within one calendar month after such entry and respite, be given to the officers of the removing parish. The sessions thought this a good objection, and dismissed the appeal. A rule

nisi

nisi had been obtained for a mandamus to the justices to enter continuances and hear the appeal.

1834.

—
The King
against
The Justices of
Norfolk.

Sir *J. Scarlett* and *Austin* in this term (*January 16.*) shewed cause, and contended that the sessions had a right to make reasonable rules to regulate the practice of their court, and this rule was reasonable.

Follett and *Palmer*, contra. By the 9 G. 1. c. 7. s. 8., it is enacted that no appeal from any order of removal of any poor person from any parish to another, shall be proceeded upon in any court of quarter sessions, unless reasonable notice be given by the appellants to the respondents, the reasonableness of which notice shall be determined by the justices at sessions; and if it appear to them that reasonable notice was not given, they are to adjourn the appeal till the next quarter sessions, and then finally hear and determine the same. That statute requires only one notice to be given. The effect of the resolution of the court of quarter sessions, if it were to prevail, would be to deprive the party of this right of appeal unless he gave two notices, one of his having entered and respited it, and another of his intention to try his appeal.

DENMAN C. J. The court of quarter sessions are to say whether reasonable notice of appeal has been given: they are to judge what notice is reasonable, but they have no right to require any other notice than the one required by the legislature. Here, they have attempted to require a notice of the entry and respite of the appeal; but their province is only to determine whether a reasonable notice of appeal has been given,

1834.

—
The KING
against
The Justices of
Norfolk.

and, if they find that notice not reasonable, to adjourn the appeal to the next sessions, and then finally determine it. This Court will not be disposed to control the discretion of the justices when it has been fairly exercised; but it is desirable that the court of quarter sessions should not vary their rules from time to time, and that they should rather lean to the hearing of appeals than to dismissing them on technical grounds.

LITLEDALE J. concurred.

TAUNTON J. The sessions had no right to make the rule in question; and, consequently, the non-compliance with that rule was no ground for their refusing to hear the appeal.

PATTESON J. concurred.

Rule absolute.

SOUTER *against* DRAKE.

In every contract for the sale of an existing lease, there is an implied undertaking by the seller (if the contrary be not expressed) to

make out the lessor's title to demise; and without shewing such title, the seller cannot maintain an action at law against the buyer, for refusing to complete the purchase.

Where a lessee in possession contracted to sell the residue of his term, being three years and a quarter, at the rent of 42*l.* per annum, the vendee paying 3*l.* for the fixtures, as per list: Held, that it was not to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease, that the vendee intended to waive his right to call for the production of the lessor's title.

1831,

1831, the defendant agreed with the plaintiff to take the said house and the said lease for the remainder of the term from *Lady-day* then next, at 42*l.* per annum, and to pay to the plaintiff 30*l.* for the said fixtures as per list thereof, and in consideration thereof the plaintiff promised to assign the lease to the defendant, and to deliver up possession of the messuage together with the fixtures as per list at *Lady-day*. The declaration, after stating mutual promises to perform the agreement, averred that the plaintiff delivered to the defendant an abstract of his title to the lease and premises for the purpose of his making and preparing a proper assignment thereof, and that he the plaintiff was ready and willing to execute an assignment of the lease and premises, according to the effect of the agreement, and of his promise and undertaking, and was at *Lady-day* ready and willing to deliver possession thereof, together with the fixtures as per list, and afterwards, on the 23d of *March* 1831, required the defendant to accept and take possession of the messuage or tenement, together with the fixtures, and prepare the assignment, and to pay to the plaintiff the said sum of 30*l.* Breach, that the defendant would not take the messuage and premises, and fixtures, or prepare the assignment, or pay the 30*l.* for the fixtures, but wholly refused so to do. Plea non-assumpsit. At the trial before *Dennan C. J.*, at the *London* sittings after *Michaelmas* term 1832, the due execution by the defendant of the agreement mentioned in the declaration was admitted; and it appeared that the residue of the term agreed to be purchased was three years and a quarter. It was proved that the plaintiff had produced an abstract of the lease and assignment of it to himself; but the defendant's solicitor insisted that the purchaser could not be compelled

1834.

 SOURCE
 against
 DRAKE.

1834.

 SOUTER
 against
 DRAKE.

to perform the contract, unless the vendor substantiated the validity of the lease, by shewing a good title in his lessor to the freehold out of which it was derived. This the plaintiff refused to do. The Lord Chief Justice directed a verdict for the plaintiff, but reserved liberty to move to enter a nonsuit. A rule was obtained accordingly, and in *Trinity* term 1833,

Comyn shewed cause (a). The plaintiff, who was the vendor of a leasehold estate in his own possession, was not bound to shew that the lessor, under whom he held, had a good title to demise. The cases which will be relied upon on the other side arose in courts of equity, and are all collected in *Purvis v. Rayer* (b), but there is no decision at law to the effect that the purchaser of a leasehold estate can call upon the vendor to produce the title of the lessor under whom he holds. On the contrary, in *George v. Pritchard* (c), which was an action by the vendee against the vendor of a lease, for the deposit, it was ruled at nisi prius, that a vendor was not bound to produce his lessor's title without an express stipulation to that effect. Lord *Tenterden* there said, "On looking to the agreement, I do not find a syllable to warrant the averment in the declaration, that the defendant undertook to make out a good title to the lease. Without such a stipulation, a party selling a lease is not bound to produce his landlord's title, a thing which in most cases would be utterly impossible. The cases the other way are only cases in equity, and although it might be true that a vendor, on a bill for a specific performance, could not compel a purchaser to take a lease, without shewing

(a) Before *Denman* C. J., *Littledale*, *Parke*, and *Patterson* Js.

(b) 9 *Price*, 488.

(c) *Ryan* & *M.* 417.

the lessor's title, still I shall hold that, in a court of law, the purchaser cannot recover his deposit on account of such title not being produced, unless the vendor has expressly contracted to furnish his lessor's title." [*Patterson J.* In *Romilly v. James* (a), which was an action brought to recover back the deposit paid on a contract for the purchase of lands in fee-simple, upon the alleged insufficiency of the title, *Gibbs C. J.* said (b) that in a court of law the plaintiff "must stand by the judgment of the court as they find the title to be, whether good or bad."—"If he had gone into a court of equity, it might have been otherwise; I know a court of equity often says, this is a title, which, though we think it available, is not one which we will compel an unwilling purchaser to take; but that distinction is not known in a court of law."] In most cases it is impossible for a lessee to produce the title of the lessor; that circumstance must be known to a purchaser, and he must therefore have contracted subject to an implied condition not to call for the production of the lessor's title. Assuming even that, in general, the purchaser of a leasehold interest would be entitled to insist on the production of the lessor's title, here both parties intended that the title should not be produced. That is shewn by the terms of defendant's agreement, and of his undertaking to accept the fixtures, and may also be inferred from the small value of the property, the short residue of the term, (three years and a quarter,) and the absence of any premium for the lease.

Thesiger and *Hayes* contra. It is a stipulation implied in every agreement for the sale of a leasehold estate,

(a) 6 *Taunt.* 263.

(b) P. 274.

1834.

 SOUTER
 against
 DEAKE.

1834.

 SOUTER
 against
 DRAKE.

where the contrary is not specified, that the vendor shall make a good title to the lease which he (being the lessee or assignee) professes to sell; and, therefore, that he shall shew that the original lessor under whom he holds had such title. If so, the vendor cannot, without shewing the title of his lessor, recover damages at law for the breach of a contract of purchase, or compel specific performance of it in equity. It may be collected, even from the judgment of Lord *Eldon* in *White v. Foljambe* (a), that his opinion was, that the party proposing to buy a leasehold estate may call on the vendor to shew the title of his lessor, although the decision there proceeded on a different ground. In *Deverell v. Lord Bolton* (b), the same learned judge says, "The proposition, that a vendor of a leasehold interest cannot produce his lessor's title, is not to be represented as universally true. I know instances to the contrary. The vendor ought, therefore, where he sells with that restriction, to describe that it is the interest he has that is to be sold;" and he afterwards says (c), "My clear opinion is, that (assignees of a bankrupt), advertising to sell a freehold estate, undertake, whether they say so or not, to make a title." And in *Waring v. Mackreth* (d), *Macdonald* C. B. in delivering judgment, says, "there is no difference between the purchase of a leasehold interest, and a fee simple, the party having agreed to purchase that interest, has a right to see whether it can be granted to him or not." In *Fildes v. Hooker* (e), Sir *W. Grant* M. R. considered it to be an implied stipulation in the contract of sale of a leasehold estate, that the

(a) 11 Ves. 337.

(c) *Ibid.* 512.

(e) 2 Mer. 427.

(b) 18 Ves. 508.

(d) *Forrest's Rep.* 129. 137.

vendor should produce the title of his lessor. He there says, "Whether the interest contracted for be *leasehold* or *freehold*, it seems reasonable that he who comes for a specific performance, should be prepared to shew that he is able to give what he seeks to compel a purchaser to take. *What is contracted for is not merely a piece of parchment containing certain covenants: it is an interest in land which is agreed to be given him.*" In *Purvis v. Rayer* (a) a bill was filed by the seller of a leasehold estate for years for specific performance. The title was referred to the master, who reported that the seller could not make a good title; on the ground that he could not produce his lessor's title. The plaintiff excepted to the report, and it was there decided, after a very elaborate argument in which all the authorities were cited, that a person offering for sale a leasehold estate, could not, in the absence of any express stipulation to that effect, compel a person contracting for the purchase to take the estate, without shewing the title of his lessor, and thus satisfying the purchaser that he himself had a right to the thing which he proposed to sell, and that it was of the nature which he represented it to be. *Richards C. B.* there said, (b) "the question was whether when a man sells a leasehold estate, he could compel the purchaser to take it without shewing him his title. *White v. Foljambe* (c) was the first case on this point. There is no case that goes the length of shewing that a lessor is not bound to shew his title."—"The general rule is, that where a vendor offers any thing for sale, the vendee is entitled to have the thing he buys with a moral certainty that he has the thing he buys. If a man sell an inheritance he must

1834.

 SOUTER
 against
 DEAN.

(a) 9 Price, 488.

(b) Sugden on Vendors, MSS. note 336.

(c) 11 Ves. 337.

1834.

—
 SOUTER
 against
 DRAKE.

shew a title to the inheritance; so if a life estate. Then what is the difference where a lease is sold?" That decision manifestly proceeded upon the principle that a person who agrees to sell any estate, whether leasehold or of inheritance, by his very contract impliedly undertakes to shew that he has that which he professes to sell, and therefore, if the estate be leasehold, to produce his lessor's title. If this be correct, the seller of such leasehold interest cannot, without shewing the title of his lessor, maintain an action against the purchaser for not completing the contract. If the rule upon this subject be different in a court of law from what it is in a court of equity, there will be a great anomaly, for it has been held in an action brought to recover back the deposit on a purchase, on the vendor's failure to make a good title, that a court of law will collaterally inquire whether the title be good in equity as well as at law, because, where the contract is to make a good title, it means a good title both at law and in equity; *Elliott v. Edwards* (a), *Maberly v. Robins*. (b) Besides, there are authorities in courts of law to shew, that a lessor or vendor of a leasehold estate is bound to shew his own lessor's title. In *Keech v. Hall* (c), Lord Mansfield said, "Whoever wants to be secure when he takes a lease, should enquire after and examine the title deeds." In *Temple v. Brown* (d), the Court of Common Pleas declined to decide the general question, unless the parties would put it on the record, so as to afford an opportunity of having their judgment reviewed. In *Roper v. Coombes* (e), where an agreement

(a) 3 B. & P. 181.

(b) 5 Taunt. 625.

(c) Doug. 22.

(d) 6 Taunt. 60.

(e) 6 B. & C. 534.

was to grant a lease for a large premium, this Court considered the contract to be for sale of a lease, and as the intended lessor could not shew, and in fact had not, a title to grant it, the other party was allowed to recover back his deposit. In *Spratt v. Jeffery (a)*, *Parke J.* said, "there can be no doubt that the vendor of a lease unconditionally, undertakes to give a good title, but every person may enter into a qualified contract."

Cur. adv. vult.

DENMAN C. J. in this term delivered the judgment of the Court.

This case, which was tried before me at *Guildhall*, and in which a rule for entering a nonsuit was obtained, and argued before my brothers *Littledale*, *Parke*, *Patteson*, and myself, turns on the question whether a lessee in possession who contracts in general terms to assign his lease can be called on by the proposed assignee to shew that the lessor had a good title to demise. However this proposition may have been doubted in former times, the observations of Lord *Eldon* in *White v. Foljambe (b)* and in *Deverell v. Lord Bolton (c)*, and of Sir *W. Grant* in *Fildes v. Hooker (d)*, certainly went far to decide it in the affirmative, though the judgment in each case proceeded up on another ground. But in the case of *Purvis v. Rayer (e)*, Lord Chief Baron *Richards*, after great consideration, and evidently after consultation with Lord *Eldon*, held that the purchaser of the residue of a term for years from a vendor in possession, had a right to call for the lessor's title.

All these were cases in equity arising on bills for spe-

(a) 10 *B. & C.* 261.

(c) 18 *Ves.* 505.

(e) 9 *Price*, 488.

(b) 11 *Ves.* 337.

(d) 2 *Mer.* 424.

1834.

SOUTER
against
DRAKE.

1834.

 SOUTER
 against
 DRAKE.

cific performance: and Lord *Eldon*, and more particularly Sir *W. Grant*, both advert to the possibility of a distinction between them and actions for damages to be recovered at law for breach of contract. We cannot however help thinking, that the opinions of these eminent judges, and the decisions, especially that of *Purvis v. Rayer (a)*, are authorities upon the general question, whether it arise in a court of law or equity, and that the true ground of refusing relief by a specific performance in these cases is, that the vendor *by his contract* was bound to make out a good title in all respects to the subject agreed to be sold, including the right of the lessor to demise, and that he had not done so. If that is his *contract* he must equally fail in a court of law, unless he can prove a performance of it on his part. And no reason occurs to us why, as the courts of law and of equity would put the same construction on a contract for the sale of a freehold estate, they should do otherwise in respect of a contract for sale of a leasehold.

The cases at law have not been numerous on the subject of contracts to grant or sell leases. That of *Gwillim v. Stone (b)*, was disposed of before the subject was so much considered as it has since been in the cases in equity. Besides, the points actually decided were, first, that on a contract to grant a lease, there is no engagement necessarily arising by *implication of law* that the lessor had sufficient power to grant such a lease, and should show a good title: for the court arrested the judgment on the ground that it was not a good breach of an agreement to grant a lease, to state that the defendant had not shewn and had not sufficient title; and the second point de-

(a) 9 Price, 488.

(b) 5 Taunt. 433.

cided was that there was no contract implied in point of fact, to deliver an abstract of title, on an agreement to grant a lease. In *Temple v. Brown* (a), the question arose as to the latter point, but cannot be considered as having been decided by it. In *George v. Pritchard* (b), on an agreement in general terms to sell an existing lease, Lord *Tenterden* was of opinion that no contract to make out a complete title could be implied, and that the vendor, without an express stipulation, was not bound to produce his lessor's title: and he considered the cases in equity as deciding merely that a vendor on a bill for a specific performance could not compel a purchaser to take a lease without shewing the lessor's title. On the other hand there is a decision of Lord *Ellenborough* which appears by no means unworthy of consideration. (c) In an action for work and labour brought by Mr. *Denew* the auctioneer, against Mr. *Deverell*, the plaintiff in the chancery suit against Lord *Bolton* above referred to, the defence was negligence in conducting the sale: several witnesses proved it to have been long the constant usage of auctioneers employed to sell leasehold property, to insert a proviso in the particular, that the vendor shall not be called upon to shew his lessor's title. The jury found a verdict for the defendant with his Lordship's full approbation. He thought the plaintiff guilty of gross negligence, in not adhering to the practice, which he observed had very properly sprung up among auctioneers, to insert such a proviso. We have, therefore, that learned judge's opinion of the reasonableness of the practice, and the fact that it has prevailed in the ordinary course of business, which is strong to shew the ge-

1834.

 SOUTER
 against
 DRAKE

(a) 6 Taunt. 60.

(b) 1 Ryan & Moody, 417.

(c) 3 Camp. 451.

1834.

SOUTER
against
DRAKE.

neral understanding that a vendor is bound to make out a good title in all respects, upon the sale of a leasehold, unless the contrary is expressed.

For the reasons above given, we come to the conclusion, that, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity; and we cannot adopt the distinction acted upon in *George v. Pritchard* (a).

It was, however, contended, that, admitting the general doctrine, the terms of the instrument, in this case (as in that of *Spratt v. Jeffery* (b)), shewed that both parties intended to waive the question of title; and that this was to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease.

From these circumstances, and from the agreement "to take the lease *and fixtures as per list*," we might think it very probable that the contracting parties never thought of the title. But this cannot be stated higher than as a very probable conjecture; and it would be dangerous to defeat the general rule by speculations on the possible intention of the parties.

It follows that the purchaser had a right to call for proof of the lessor's title before he parted with his money; and as no title was shewn, this action for refusing to complete the purchase cannot be maintained.

Rule absolute.

(a) 1 *Ryan & Moody*, 417.

(b) 10 *B. & C.* 249.

1834.

The KING *against* The Justices of the West Riding of YORKSHIRE. Tuesday,
Jan. 21st.

(Case of the LEEDS and WHITEHALL Roads.)

IN 1826, an act of parliament was passed for making and maintaining a new road from *Leeds* to *Whitehall*, near *Halifax*, and several branch roads therefrom, all in the West Riding of the county of *York*. The preamble was in the following words:—"Whereas the making and maintaining a new turnpike road from *Leeds* in the West Riding of the county of *York*, to join the *Wakefield* and *Halifax* turnpike road at or near *Whitehall* in the township of *Hipperholme-cum-Brighouse* in the parish of *Halifax* in the said Riding, passing through or into the several townships or places of *Leeds*, *Holbeck*, &c. (naming several more), all within the Riding aforesaid, and the making and maintaining several branch roads from and out of the said main turnpike road, will be a

The General Turnpike Act, 4 G. 4. c. 95. s. 87. gives an appeal to the sessions to any person who shall think himself aggrieved by any thing done by any two justices in pursuance of that act, or any local turnpike act; and declares, that the determination of the sessions shall be final and conclusive, and that no proceeding to be had in pursuance of that act shall be removed by cer-

tiorari. The sessions on appeal against a certificate of two justices, that a turnpike road, made under a local act, had been completed, and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, this Court refused to grant a mandamus to them to hear the appeal on the ground that their decision was contrary to the local act.

A local turnpike act recited, "that the making and maintaining a new turnpike road from *Leeds* to join the *Wakefield* and *Halifax* turnpike road, at a certain point, and several branch roads (therein also described) from and out of the said main turnpike road, would be an advantage to the inhabitants of *Leeds* and *Halifax*, and to the public in general;" and it authorized the making of the said several roads, and enacted, "that the said new roads should not be respectively opened to the public, or become public roads, until two justices should have certified that the said roads respectively, and the works thereon respectively, were completely made and fit to be travelled upon throughout the whole length of such roads respectively."

Scoble, per *Littledale* and *Taunton Jn.*, that the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed and fit to be travelled on, but that the main road, when so completed, and certified so to be by two justices, became a public road, although the branch roads were still unfinished,

great

1834.

—
The King
against
The Justices of
The West
Riding of
YORKSHIRE.

great accommodation to the inhabitants of the townships of *Leeds* and *Halifax*, and of the several townships and places lying near the said roads, and to the public in general, &c." The act, after authorizing the making and maintaining the several roads, contained the following clause: — " Provided always, and be it further enacted, that the said new roads shall not be *respectively* opened to the public, or become public roads or highways, until two justices of the peace acting for the West Riding of the county of *York*, legally assembled at a special sessions, shall have certified that the said roads *respectively*, and the bridges, culverts and embankments, and other works thereon *respectively*, are completely made and fit to be travelled upon throughout the whole length of such roads *respectively*." Two justices acting for, and residing within, the wapentake of *Agbrigg* and *Morley* in the said Riding, certified that they had viewed so much of the main turnpike road, authorised to be made by the act of parliament, as was situate within the wapentake aforesaid, and lay between *Whitehall* and the centre of the river *Aire* in the township of *Holbeck* in the said Riding; and that such part of the said main road, and the bridges, culverts, embankments, and other works thereon, were completely made and fit to be travelled upon throughout the whole length of such road. Two other justices, acting for and residing within the wapentake of *Skyrack* in the said Riding, certified that so much of the said main road, &c., as was situate between a certain turnpike road called the *Wellington Bridge Road*, and the centre of the river *Aire*, both in the township of *Leeds*, were completely made and fit to be travelled upon throughout the whole length of such road. At the *Michaelmas* West Riding sessions,

sessions, an appeal was entered by *Briggs*, a rated inhabitant of *Wike* (one of the places enumerated in the preamble of the above Turnpike Act), against these certificates. On the hearing of the appeal, the counsel for the appellant objected that the certificates were void, because all the branch roads authorised to be made by the act had not been completed; and thereupon the Court, after hearing the point argued, and without going further into the merits of the appeal, adjudged, that as the certificates were given before the branch roads were completed, they were therefore void. Before the adjudication, the counsel for the respondents tendered evidence in support of the certificates; but the Court refused to hear it. A rule nisi having been obtained, calling upon the defendants to shew cause why a mandamus should not issue, commanding the Justices to enter continuances and hear the appeal,

1834.

The King
against
The Justices of
The West
Riding of
YORKSHIRE.

Sir *G. A. Lewin* and *Baines* now shewed cause. The court of quarter sessions have decided that the certificate of the justices was void, because it was granted before the branch roads were completed. That decision, whether right or wrong, is made final by the General Turnpike Act, 4 G. 4. c. 95. s. 87. (a) The attempt

(a) It enacts, that if any person shall think himself aggrieved by any determination made, or matter or thing done by any justices of the peace in pursuance of that act, or any local act for making or repairing any turnpike road, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace for the riding, &c. wherein the cause of complaint shall arise; and the said justices at such sessions shall hear and finally determine the causes and matters of such appeal; and the determination of such general or quarter sessions shall be final and conclusive to all intents and purposes; and no proceeding to be had or taken in pursuance of that act, shall be removed by certiorari or any other writ or process, into any court of record at *Westminster*.

1834.

The KING
against
The Justices of
The West
Riding of
YORKSHIRE.

is by the present rule to obtain the opinion of this Court upon the very point of law decided by the sessions. Unless the Court determine that point in favour of the respondents, it is useless to grant a mandamus, because, if the certificate was valid before the appeal, it is so now; *Rex v. Cumberworth (a)* shews that the judgment of the sessions, even on the point decided by them, is right. There, the trustees were authorised to make a road from one place to another, and the making of the entire road was held to be a condition precedent to any part of the highway becoming repairable by the public. The Road Act in that case recited that the making of the one turnpike road would be a great advantage to the public. Here the recital is, that the making of the *several* roads will be of great advantage to the public; the making of *all* those roads, therefore, was a condition precedent to any of them becoming highways repairable by the public. But, however that may be, this Court has no jurisdiction to review the decision of the quarter sessions, except on a case sent up for their consideration; *Rex v. The Justices of Carnarvon (b)*; and it will not, therefore, grant a mandamus to hear this appeal.

F. Pollock, Milner and Dundas contra. *Rex v. Cumberworth (a)*, is distinguishable from this case, because, there, the Turnpike Act contemplated the making of *one* road only. Here, the Turnpike Act contemplates the making of *several*, and it contains a proviso "that the said new roads shall not be *respectively* opened to the public, or become public roads or high-

(a) 3 B. & Ad. 108.

(b) 4 B. & A. 86.

ways, until two justices shall have certified that the said roads *respectively*, and the bridges, and other works thereon *respectively*, are completely made and fit to be travelled upon throughout the whole length of such roads *respectively*." The true meaning of that clause is, that when any one or more of the roads shall be made and certified, such particular roads are to become public roads. But it is said that the sessions have adjudged the certificate to be void, and that their decision on that point is final. If the sessions had heard all the evidence, and then decided on a point of law, this court would not interfere, but they decided on a preliminary objection, and rejected evidence in support of the certificate. [*Patteson J.* The object of that evidence must have been to show, not that the certificate was valid in point of law, but that, in point of fact, the main road was completed. By the general turnpike act any person thinking himself aggrieved by any determination of the justices in pursuance of that act, or any local act, for making any turnpike road, may appeal to the sessions, and the sessions are to hear and finally to determine the causes and matters of such appeal." Now, here, one of the grounds of appeal was that the certificate was granted before all the branch roads were completed. That fact having been admitted, the sessions have decided that the certificate was for that reason void: their decision in that respect could not have been altered by evidence.] If the sessions had heard the evidence that the road was completed and that it was an advantage to the public, they would have paused before they decided as they did on the point of law.

1834.

The King
against
The Justices of
The West
Riding of
YORKSHIRE.

1884.

—
The King
against
The Justices of
The West
Riding of
YORKSHIRE.

DENMAN C. J. Assuming that the judgment of the Court of Quarter Sessions does decide that the certificate was void in point of law, I am of opinion that this Court has no power to interfere; because the eighty-seventh section of the General Turnpike Act (4 G. 4. c. 95.) makes the decision of the sessions final and conclusive, and takes away the certiorari. The effect of holding that, in consequence of the special nature of the judgment, we might grant a mandamus to them to hear the appeal, would be to repeal the eighty-seventh section, and to enable the justices to shrink from the responsibility cast on them by the legislature, and to throw it on this Court. It is unnecessary to decide whether the sessions were right in holding that the certificate, in this case, was premature. I think that they were perfectly right in deciding at once on the point of law without going into evidence which could not possibly alter their judgment on that point. We are of opinion that the sessions have done what they were authorised to do by the statute; and that we ought not to grant a mandamus to review their decision, because we should be thereby doing indirectly that which the statute prohibits us from doing directly.

LITLEDAL J. I think we ought not to grant this mandamus. The sessions have decided that the certificate was void, and the General Turnpike Act makes their decision final and takes away the certiorari. As to the question on the act of parliament, I think that the certificate was not premature. The statute provides "that the said new roads shall not be *respectively* opened to the public, or become public roads or highways,

highways, until two justices shall have certified that the said roads *respectively*, and the bridges and other works thereon *respectively* are completely made and fit to be travelled upon throughout the whole length of such roads *respectively*." The effect of that clause, in which the word *respectively* occurs four times, is to make each road, as soon as *it is complete* and certified, a *public road*. I cannot entertain any doubt that the certificate was not premature. It is unnecessary, however, to decide that point, because the sessions have adjudicated upon it, and the legislature has declared that their judgment shall be final.

1834.

—
The King
against
The Justices of
The West
Riding of
YORKSHIRE.

TAUNTON J. It is not necessary to decide the point on the construction of the local act. If it were, I should say that my opinion accorded with that expressed by my brother *Littledale*. We are asked here to issue a mandamus to the sessions to rehear the appeal, because they have adjudged that the certificate was void, without receiving any proof. It is admitted that one of the questions submitted to the court of quarter sessions was whether the certificate was premature. Now when the legislature, by the General Turnpike Act, took away the certiorari, it must have intended to take away our power of questioning the legality of the determination of the court of quarter sessions, and to make that a court without appeal. If therefore we made this rule absolute, on the ground that the decision of the sessions was wrong, we should indirectly be repealing the eighty-seventh section of the General Turnpike Act, which makes that court supreme judges in matters of this sort. The rule therefore must be discharged.

1834.

**The King
against
The Justices of
The West
Riding of
YORKSHIRE.**

PATTESON J. It is not denied that sect. 87. of the General Turnpike Act, gave an appeal from the certificate of the two justices to the court of quarter sessions, and consequently that that court had jurisdiction; nor is it denied, that at the sessions there were two points to be decided; first, a point of law, whether the certificate was premature and void, on the ground that the branch roads had not been completed; and secondly; a question of fact whether the main road was completely made. If the preliminary question was decided in favour of the respondents, the second became wholly immaterial, and there could be no ground for receiving evidence. It is undoubtedly no ground for granting a mandamus, that the court of quarter sessions refused to hear useless and irrelevant matter. The sessions decided that the certificate was void; and their judgment is made final by the General Turnpike Act. I do not say what my opinion would have been upon the point raised on the act of parliament, because I will not encourage parties to obtain the opinion of the court on speculative points.

Rule discharged.

1834.

JANE GRAHAM, Executrix of JOSEPH GRAHAM,
against BARRAS.

ASSUMPSIT on a policy of insurance. At the trial before *Alderson J.*, at the Spring assizes for *Northumberland 1833*, a verdict was found for the plaintiff for 100*l.*, subject to the opinion of this court upon the following case.

The policy, dated 23d of *March 1831*, was upon the ship *Castlereagh*, the property of the said *Joseph Graham*, at and from the 1st day of *April 1831*, at noon, to and with the 1st day of *January 1832*, at noon, warranted not to sail foreign after the time restricted in the *Liberal Premium Club Rules*. Copies of the policy and rules were annexed to and formed part of the case. On the 31st of *August 1831*, the said ship, having a full crew

A ship was insured from *April 1st, 1831*, to *January 1st, 1832*, warranted not to sail foreign after the times limited in certain club rules. The rules or warranties of the club limited the times of sailing to different parts of the world, and by a distinct warranty (the ninth) it was declared, that the time of clearing at the custom-house should be

deemed the time of sailing, provided the ship was then ready for sea. The vessel insured was bound for the *Bay of Fundy*, from *Dublin*, and the last day for sailing, by the rules, was the 1st of *September*. She cleared out on the 31st of *August*, and dropped down the *Liffey* on the 1st of *September*, with an incomplete crew, (though a full complement was engaged before the ship cleared out,) to a place within the port of *Dublin*, where she lay at anchor the rest of the day. During that day the whole crew came on board, and on the 2d she proceeded on her voyage, having been prevented from doing so on the 1st by an unfavourable wind. She was afterwards lost:

Held, per *Littledale J.*, and semble per *Taunton J.*, that the policy must be construed as incorporating the ninth article of warranty, and not merely the several directions as to the times of sailing; *Denman C. J.* and *Patteson J.* dubitantibus:

Held, by all the Court, that the ship did not actually sail till after the 1st of *September*, and that she was not ready for sea at the time of clearing out, the whole crew not being then on board: Also, *Littledale J.* dubitante, that the words in the ninth article of warranty, "provided the ship is then ready for sea," if incorporated with the policy, must be limited to the point of time at which the clearances were obtained, and that as the vessel was not then ready, for want of a full crew, there had not been a constructive sailing on or before the 1st of *September*, according to the ninth warranty.

By one of the rules it was provided, that vessels might sail after the limited time on payment of an additional premium as per scale; and by another rule, every member of the club, before the commencement of each voyage, was to give his acceptance for the premium; and parties "neglecting to give notice" were subject to a penalty: Held, (assuming that these rules could be incorporated with the present policy), that a party whose ship had sailed too late and been lost, could not afterwards obtain the benefit of the extended time, by submitting to the penalty and paying the extra premium.

1854

General
agent
Barnes.

ready to take her out to sea, though not all actually on board, was lying moored at *St. George's Dock, Dublin*, under charter to proceed with freight to *St. Andrew's* in the Bay of *Fundy*, and on the same day she was cleared out in the usual way at the custom house of *Dublin*. About half-past three in the morning of the 1st of *September* the ship, with only the master, mate, one seaman, and two boys, (not then having a sufficient crew on board for the voyage) dropped down the river *Liffey* with a fair wind to the *Pigeon Hole* within the port or harbour of *Dublin*, assisted by a boat's crew. The ship arrived at the *Pigeon Hole* about five o'clock in the morning, and came to anchor at the *Pigeon Hole* within the harbour or port of *Dublin*. The master returned to the city of *Dublin* after mooring the vessel in the *Pigeon Hole*, and after collecting the rest of the crew and procuring his dispatches, re-joined his vessel in the *Pigeon Hole* about six o'clock in the afternoon of the same day. About that hour and not before, the residue of the crew, which was then complete, came on board the ship at the *Pigeon Hole*. In the afternoon and evening of the 1st of *September* the wind was unfavourable for the *Castlereagh's* going out to sea, but a little before midnight it became fair, it being then low water, and she went out as soon afterwards as she could, with a fair wind. On the 2d of *September*, about half-past three o'clock, and with the tide at half flood, she weighed anchor, and sailed from the *Pigeon Hole* and proceeded on her voyage, and ultimately, and not before, quitted the port of *Dublin* about half-past five o'clock on the morning of the 2d of *September*. The *Pigeon Hole* is about two miles below the custom-house, and from the *Pigeon Hole* to the mouth of the port of *Dublin* is

two miles further. On the morning of the 1st of *September* it was high water at *Dublin* at forty-nine minutes after five, and at the evening tide it was high water between six and seven. The tide in the *Liffey* is a six hours' tide. Ships of the burthen of the *Castlereagh* may safely proceed out of the port at half flood. The tide in the *Liffey* ebbs at about two or three knots an hour, and ships may drop down out of the harbour from the *Dock* or *Pigeon Hole* with the tide. It was not proved that the defendant was a member of, or had any ships insured in the Liberal Premium Club. The *Castlereagh* was totally lost in *December* 1831.

The question for the opinion of the court was, whether the sailing of the *Castlereagh* under the circumstances above detailed constituted a sailing within the terms of the warranty. If the court should be of opinion that it did, a verdict for 100*l.* was to be entered for the plaintiff, otherwise a nonsuit to be entered.

The following are the rules and warranties of the Liberal Premium Club, chiefly referred to in the argument:—

Warranties. Art. 6., provides that ships are “not to sail to *Quebec* from ports on the east coast of *Great Britain* after the 10th of *August*, from ports on the west coast of *Great Britain*, or ports in the *British Channel* and *Ireland*, after the 15th of *August*, nor to any other ports in *British America* from ports on the east coast after the 25th of *August*, nor from ports on the west coast of *Great Britain*, ports in the *British Channel*, *Ireland*, or ports in *Europe* westward of the *Downs*, after the 1st of *September*; but allowed to sail to the *Bay of Fundy*, and all ports on the east coast of *Nova Scotia*, as far north as *Cape Canso*, at all times, on pay-
ment

1834:

GRANBY
against
BARRAS.

1834.

GRAHAM
against
BARRAN

ment of an additional premium, as per scale, on the sum insured." Articles 7 and 8 contain similar restrictions on voyages to certain ports in *Europe*. Article 9 is as follows: — "The time of clearing at the custom-house to be deemed the time of sailing, provided the ship is then ready for sea, as relates to the sixth, seventh, and eighth warranties; but ships allowed to proceed to any port for the purpose of clearing outward, provided such port and time of sailing be within the limits of the warranties; but in case of not clearing, the master's letter, or such other proof as the committee may think satisfactory, to be deemed sufficient."

Rule 1. declares, "that this association shall be conducted upon the principle of paying premium for each voyage or passage, agreeably to the scale hereunto annexed." By rule 3., "each and every member shall, on or before the commencement of each voyage or passage, give, or cause to be given, his acceptance to the secretary, for the amount of premium for such voyage or passage as he may be proceeding upon, agreeably to the scale of premiums" (which was prefixed to the warranties and rules); "the time of breaking ground in ballast, or when at the ballast marks with a cargo, to be deemed the beginning of a voyage or passage. Neglecting to give notice, to be liable to a fine on the sum insured of 1 per cent. in the coal and coasting, $2\frac{1}{2}$ per cent. in the *Baltic* and *North Sea*, and 5 per cent. in the *American* and other trades, in case of loss or average; and neglecting or refusing to return bills accepted, ten days after having been applied to by the secretary, to cease being insured, on receiving written notice to that effect."

This

This case was argued in the present term, (Jan. 17.)
by —

1834.

GRAHAM
against
BARRAS.

Alexander for the plaintiff. The ship sailed, according to the meaning of the warranty, on the first of *September* at latest. She had cleared out at the custom-house on the 31st of *August*; and on that day, and on the 1st of *September*, when she dropped down the river to the *Pigeon Hole*, she had a full crew, though they were not all on board. If she sailed on one of those days, her being detained at the *Pigeon Hole* by an unfavourable wind till the 2d was not material. It was not necessary to her sailing, that all the crew should be actually on board: by the ninth warranty, the time of clearing is the time of sailing, and at that time the captain at least must be on shore. Nor can the accidental absence of one or two of the seamen be material, especially where it is not even alleged that any mischief ensued. The ship, on the 31st, and when she dropped down the river, had every thing ready for the prosecution of her voyage, and in that respect the case differs from *Pittegrew v. Pringle (a)*. There, there was no time during the 1st of *September*, (the last day for sailing,) at which the ship was ready for sea; and Lord *Tenterden*, in his judgment, insisted on that fact. At all events, when the whole crew were on board, which happened on the 1st of *September*, the ship had sailed within the meaning of the policy. For a ship to *sail*, according to the ordinary acceptation, some movement is necessary; but these articles allow of a constructive sailing, which depends, not on any locomotion, but on the vessel having cleared, and being in a condition to prosecute her voyage. But, further, if there was not a sailing within due time, the sixth article

(a) 3 B. & Ad. 514.

1834.

GRAHAM
 against
 BARRER.

of warranty provides that vessels may sail to the bay of *Fundy* (to which this ship was bound) at all times, on payment of an additional premium, as per scale, on the sum insured. The payment of that additional premium is not a condition precedent to such later sailing; circumstances may preclude the possibility of its being stipulated for and paid beforehand; but it may be recovered afterwards, and the scale would fix the amount. The case of a voyage being commenced without previous notice and payment of the proper amount of premium, is provided for by the third rule, which imposes a penalty in such cases. The omission does not avoid the policy. [Denman C. J. How can you make that rule part of the present policy? The policy only incorporates the club rules so far as they point out the times of sailing, not for other purposes.] The sixth warranty, referred to by the policy, must be read in connection with the third rule, which is necessary to explain it. By sailing later than the 1st of *September* (if he has done so) the assured rendered himself liable to an additional premium capable of being ascertained; and that liability, though there has been no payment of the premium, is equivalent to it for the purpose of this action, upon the same principle on which it has been held that in an action for a personal injury, the plaintiff may recover the amount of his surgeon's bill as damages, though it be unpaid. (a) [Denman C. J. According to your argument, parties might, in the case of such an additional premium, be made insurers against their will. They might have reasons for not wishing to accept the risk on such a premium. And the assured would never pay it unless

(a) *Dixon v. Bell*, 1 Stark. N. P. C. 287. S. C. 5 M. & S. 198.

where

where a loss happened. *Littledale J.* Supposing that the time may be extended on payment of an additional premium, ought not the assured to state beforehand what extension of time he will want? And when is he to give that notice to the insurers? Can it be given after the warranty has failed? *Denman C. J.* He must do it when he makes his bargain]. The party may not know that he will want the additional time, soon enough to give notice. It is sufficient that when he takes the extended time, a liability to the further premium arises.

1834.

 GRAHAM
against
BARRAS.

W. H. Watson contra. As to the last point: this is not a question between the plaintiff and the Liberal Premium Club; and their rules are only applicable so far as the present policy refers to them with respect to the times of sailing. The scale of premiums cannot be connected with the present policy: the premiums in the scale are on voyages to different parts of the world; the policy is a time policy. Even supposing the rules applicable, parties are not to be made insurers against their will. [*Denman C. J.* There is no doubt that, if the assured wishes to avail himself of the extension of time, paying the additional premium, the insurers must be apprised of that intention at the time of commencing the voyage; it is not to remain in the breast of the assured.] Then as to the other points. It is established by *Ridsdale v. Newnham* (a), *Lang v. Anderson* (b), and *Pittegrew v. Pringle* (c), that, in order to sail, according to a warranty like this, a ship must break ground with a bonâ fide intention to prosecute her voyage, having her clearances, and being, in every

(a) 3 M. & S. 456. (b) 3 B. & C. 495. (c) 3 B. & Ad. 514.

respect,

1834.

—
 GRAHAM
against
 BARRELL

respect, fitted to perform the voyage. Then do the warranties in the present case introduce any variation of that rule? The policy here, by its terms, incorporates so much of the sixth, seventh, and eighth warranties as relates to the times of sailing to particular places, and no more. The ninth warranty is no part of the regulations so incorporated: it is not a restriction upon them, but only a provision added, on the part of the club, to define what shall be a sailing, under their policies. If that warranty applies to the present case at all, it must in toto; but the latter part cannot apply. In *Pittegrew v. Pringle (a)*, the agreement of the parties was to be governed by “the rules and regulations *as to the periods of sailing and limits of navigation*, which govern the principal insurances of *North Shields* :” here the rules and warranties in question are only adopted as to a particular point, viz. times of sailing. But, assuming that the ninth warranty is to be taken as part of the policy, still there was no sailing within the limited time. The time of clearing is to be deemed the time of sailing, “provided the ship is *then* ready for sea.” To comply with that regulation, the ship ought, at the time of clearing, to be ready for sea in every respect short of heaving the anchor: it is not enough that a crew is engaged, the men must be on board. It cannot have been intended that, if a vessel cleared without being ready for sea, and became ready afterwards, though at the last moment, that should operate as a compliance with the regulation. Then, if the vessel be not ready for sea at the time of clearing, according to the letter of the rule, she must actually sail, according to the definition

(a) 3 B. & Ad. 514.

of sailing laid down in the cases, within the stipulated time. But here the ship never had her complement of men on board till six in the evening of the 1st of *September*, and she did not actually sail till the 2d. Her dropping down the river, with an incomplete complement of men, on the 1st, was merely preparatory to the voyage, *Ridsdale v. Newnham* (a). There was, therefore, in this case, neither a constructive sailing within the ninth warranty, nor an actual sailing within the time limited by the sixth.

1834.

 GRAHAM
 against
 BARRAS.

Alexander in reply. The ninth warranty and the preceding ones must be taken together, because the ninth is introduced to explain what the parties mean by the word "sail," and its effect is to give that word a peculiar sense. The vessel here had cleared, and had also every requisite to make her ready for sea, on the 1st of *September*. She did, therefore, constructively sail on the 1st. In *Ridsdale v. Newnham* (a), the ship had not obtained her clearances on the last day. So, in *Pittewgrew v. Pringle* (b), there was no period on the last day, at which the ship was ready for sea. In *Lang v. Anderson* (c), the question turned upon an actual sailing.

DENMAN C. J. This is an action on a time policy, the warranty being, not to sail foreign after the time limited in the Liberal Premium Club rules. I feel great doubt on the first question raised for the defendant, namely, whether the rules can be referred to for any purpose but to ascertain the times to which the vessel is restricted in sailing to different parts of the world. But if the ninth

(a) 3 M. & S. 456.

(b) 3 B. & Ad. 514.

(c) 3 B. & C. 495.

1834.

GRAHAM
against
BARRAS.

article of warranty is to be considered as referred to by the policy, the question then is, whether that warranty has been complied with. (His Lordship then read it.) By this regulation the time of clearing is to be deemed the time of sailing "provided the ship is then ready for sea." It certainly is most convenient for both parties to have such a stipulation as this, that the time of sailing may be referred to a period of time capable of being ascertained by both; and the time of clearing is such a period. The simple question then is, whether the ship was ready for sea when she was cleared? Now at that time there was a crew engaged, but where they were, whether within ten miles or forty, does not appear. It cannot be said that the ship was ready for sea when she had only the master, mate, one seaman and two boys on board, and could not get down the *Liffey* without assistance. I think the rule as to an extension of the time of sailing does not apply to this policy, and if it did, that the facts here do not entitle the plaintiff to claim the benefit of it.

LITLEDALE J. There was no sailing, in this case, according to the ordinary sense of that word, by the 1st of September. Then the question is, first, whether the ninth warranty, which gives a different interpretation of the term "sail" is to be considered as inserted in this policy? and I think we ought not to construe the policy so strictly as to hold that warranty excluded. The next question is, whether the assured complied with the condition of sailing, according to that warranty? At the time when the clearances were obtained the crew were not actually on board; it does not appear how that happened; whether they were ready to come on board when

it

it was thought proper to call for them, or whether they were at a distant place, or dispersed over the town or harbour of *Dublin*; at all events they were not on board. Then we have to enquire, whether the words "time of clearing," in the warranty, are to be considered as giving a continuing protection down to the time when the crew joined the ship; and I rather think that the words ought not to be restrained to the actual time of clearance, but that the "clearance" is a continuing thing, and over-rides the whole time down to the period on the 1st of *September* when the complete crew was on board. On the other point, whether the assured can now take advantage of the rule allowing an extension of the time on payment of a higher premium, I entertain no doubt. The claim to do so is attended with innumerable difficulties.

1834.

GRAHAM
against
BARRIE.

TAUNTON J. The policy warrants that the ship shall not "sail foreign" after the times limited by the Liberal Premium Club rules: that is a warranty that, as to her time of sailing, she shall conform to those rules; and, by one of the rules, it is provided, that no vessel insured shall sail to any port in *British America* from a port in *Ireland*, after the 1st of *September*. Then the simple question is, did this ship sail after the 1st of *September* or not? Had she actually sailed on that day? I think not, because, on that day, after arriving at the *Pigeon Hole*, she remained stationary, and did not proceed to sea. Then my Lord has expressed a doubt whether the ninth article of warranty ought to be taken into consideration in construing this policy. I rather think that it ought; but, giving the plaintiff all the advantage of it, I still think he is not entitled to recover. By that regulation

1884.

GRANHAM
vs
HARRIS.

the time of clearing is to be deemed the time of sailing, provided the ship is *then* ready for sea. I cannot refer that word *then* to anything but the point of time when the clearance was obtained: if she had not her whole crew on board when the ship was cleared, she was not "then ready for sea" according to the warranty. *Pittegrew v. Pringle* goes the whole length necessary for determining this case. *Parke J. (a)* there says, "The vessel certainly had not every thing ready for the performance of her voyage on the 1st of *September*, nor could it be said, when she got under sail, that nothing remained to be done afterwards; for she had to take on board what was material for the prosecution of the voyage, a larger portion of ballast." So here, the ship had not every thing ready for the performance of her voyage, because she had not her full crew: as in that case a larger quantity of ballast was wanted, so here the vessel required a larger number of men. I come to the present conclusion with the more confidence, because there is no case that conflicts with it. Of *Lang v. Anderson (b)*, where the vessel was held to have sailed, it is sufficient to say, as *Littledale J.* observes in *Pittegrew v. Pringle (a)*, that she was on her voyage in the regular course for ships of that size, on the day warranted.

PATTESON J. I am also of opinion that the plaintiff cannot recover. Supposing that the ninth clause of warranty is to be considered as forming part of the policy, I think the vessel was not ready for sea according to that clause. The words "*then* ready for sea," must be referred to the 31st of *August*, when she ob-

(a) 3 B. & Ad. 522.

(b) 5 B. & C. 496.

tained her clearances, and, at that time, the crew appear to have been wandering about *Dublin*. They were, indeed, engaged; but, if that were held sufficient, it might as well be said that a ship was ready for sea if a cargo was procured but not on board. I have, however, a very great doubt indeed whether the ninth clause of warranty is incorporated in the policy. This is a time policy, not a policy on the voyage. There were a number of places to which she might sail, and the rules ascertain the times for sailing to those places. It appears to me that the policy refers plainly to the times of sailing so pointed out, and not to the regulation which declares what shall be evidence of the ship having sailed.

1834.

 GRAHAM
 against
 BARRAS

Nonsuit to be entered.

**The KING against The Inhabitants of St. MARY-
 AT-THE-WALLS, COLCHESTER.** *Wednesday,
 Jan. 22d.*

ON appeal against an order of two justices, whereby *Thomas Lester*, his wife and children, were removed from the parish of *Stratford St. Mary*, in the county of *Suffolk*, to the parish of *St. Mary-at-the-Walls*, in the borough of *Colchester*; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper's father had gained a settlement in the parish of *St. Mary-at-the-Walls*. In the year 1811, the

Pauper, on the 16th of May 1811, being in the local militia, hired himself to the Colonel of his regiment, to serve for a year, and served under that contract. On the 4th of May 1812, the regiment was assembled for training, and continued in

training till the 19th of May. During that time the pauper was under military control, though he also served the Colonel as an in-door servant. While the regiment was assembled, he received pay from the crown, and also his wages from his master: Held, that the pauper gained a settlement by hiring and service, the fact of his being a militia-man having been known to the master at the time of the hiring.

1834.

The King
against
The Inhabit-
ants of
St. Mary-at-
the-Walls,
Colchester.

pauper was a private in the 1st regiment of *Essex Local Militia*, commanded by Colonel *Strutt*. On the 24th of *April* 1811, the regiment was assembled for training at *Colchester*, and continued there in training till the 15th of *May* following, up to which day the pauper was a drummer upon the permanent staff of the regiment. On the 16th of the same month, the pauper then being off the permanent staff, Colonel *Strutt*, who knew that the pauper was in the local militia, hired him for a year at the wages of 10*l*. The pauper served the Colonel under that hiring. He resided in the parish of *St. George, Hanover Square*, in *London*, until the 4th of *May* 1812, upon which day the regiment was again assembled for training at *Colchester*. Colonel *Strutt* went there to take the command, and the pauper accompanied him, and was reported as belonging to the regiment. Each officer being by the rules of the service allowed a soldier from the ranks as a personal servant, the pauper was chosen by the Colonel to be his servant. The regiment continued to do duty at *Colchester* till the 19th of *May* in that year, during which time the pauper was under military control, but he was only paraded once, and served the Colonel during the whole period as an indoor servant. The pauper received pay from the Crown whilst the regiment was assembled; he also received his wages from his master for the same period. Upon the 16th of *May* 1812, the Colonel paid the pauper his wages of 10*l*., and upon that day hired him for a year from that time at the wages of 14*l*. the year. Under this second contract, the pauper continued in the service of Colonel *Strutt* till *November* 1812, when he was discharged; having remained from the 16th to the 19th of *May* 1812, at
Colchester,

Culchester, under military control, serving the Colonel as before mentioned.

1894.

The King
against
The Inhabit-
ants of
ST. MARY-AT-
THE-WALLS,
COLCHESTER.

Austin and *Palmer*, in support of the order of sessions. The pauper, being a local militia-man, could make only a conditional contract to serve for a year; viz., provided he was not called upon to do duty in the militia. Here, in fact, during the first year for which he was hired, he was called on to serve as a militia-man, and was subject to the control of the Crown during eleven days of that year. There was neither hiring for a year, nor a year's service under the contract. Under the second contract, there was not a year's service. [*Patteson J.* The master, at the time of hiring, knew that the pauper was in the local militia; and the 52 G. 3. c. 38. s. 65. enacts, that no service under that act of any apprentice shall be deemed an absence from service, or a breach of any agreement as to service, or absence from service, in any indenture of apprenticeship. The very point now raised was decided in *Rex v. Elmley Castle* (a)] That case is inconsistent with *Rex v. Taunton St. James* (b), where the judges, after an elaborate argument, decided that that section of the Militia Act applied only to contracts existing at the time of the ballot or enrolment, and not to contracts subsequently made. In *Rex v. Elmley Castle* (a) the sixty-second section of the Militia Act, 52 G. 3. c. 68., was not adverted to; but in *Rex v. Taunton St. James* (b), it was observed by *Bayley J.*, that that section, which enacts that the enrolment of servants shall not vacate or rescind contracts between master and servant, except in certain cases, applies to contracts existing at the time of the enrolment; for such contracts

(a) 3 B. & Ad. 826.

(b) 9 B. & C. 831.

1834.

The KING
against
The Inhabit-
ants of
St. Mary-A-
THE WALLS,
COLCHESTER,

only could be vacated or rescinded by the enrolment; and that the sixty-third section, which provides that no ballot, enrolment, and service under that act, shall extend to make void, or in any manner to affect any contract of service, notwithstanding any agreement in such contract, and that no service under that act of any servant shall be deemed or taken to be an absence from service, or a breach of any agreement as to any service or absence from service, &c., applies only to the same class of contracts. In *Rex v. Elmley Castle* (a), the case of *Rex v. Taunton St. James* (b) was not much noticed. [Taunton J. Parke J. did refer to and distinguish that case; he says, "in *Rex v. Taunton St. James*, the objection was, that the pauper was not, when he hired himself, capable of making an absolute contract to serve for a year; and, therefore, having made such contract without reference to his liability as a militia-man, he was not lawfully hired for a year, and gained no settlement. But here, the pauper did communicate the fact of his being a militia-man to the master." Patteson J. The pauper, if he had not informed the master at the time of the hiring that he was a local militia-man, would have made an absolute contract which he had no power to make; but here the master was aware of that fact.] Then the hiring was conditional, and the event contemplated in the condition occurred during the year for which the pauper was hired; and, therefore, there was no yearly hiring. [Denman C. J. As the master knew that the pauper was liable, during the year, to be called on to serve in the militia, did he not, during the time for which the

(a) 5 B. & Ad. 826.

(b) 9 B. & C. 831.

pauper was actually serving, dispense with his service?] That is the question, and *Rex v. Westerleigh* (a), and *Rex v. Winchcombe* (b), will be relied upon in support of that position; but those cases were spoken of with disapprobation by Lord *Ellenborough* in *Rex v. Beaulieu*. (c)

1834.

—
The King
against
The Inhabit-
ants of
St. MARY-AT-
THE-WALLS,
COLCHESTER.

Knox, contra, was stopped by the Court.

DENMAN C. J. In *Rex v. Elmley Castle* (d), *Rex v. Taunton St. James* (e) was clearly before the Court; it was cited by the counsel, and referred to by one of the judges. Those cases were decided within the space of three years of each other, and my brother *Littledale* concurred in both judgments. The ground of distinction taken in *Rex v. Elmley Castle* is very satisfactory. This case falls within it, and the pauper, therefore, gained a settlement by his service with Colonel *Strutt*. The order of sessions must be quashed.

LITTLEDALE, TAUNTON, and PATTESON Js., concurred.

Order of sessions quashed.

(a) *Burn. E. C.* 753.

(e) 5 *M. & S.* 229.

(c) 9 *B. & C.* 831.

(b) *Dougl.* 391.

(d) 5 *B. & Ad.* 826.

1834.

*Wednesday,
Jan. 22d.*

The KING against The Inhabitants of PRESTON.

Where an instrument is not required by law to be stamped within a particular time after its execution, the Court, upon its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping.

An indenture of apprenticeship, without premium, was executed, April 27th 1825, but not stamped till July 1832, when a 1*l.* stamp was put on it, and a 5*l.* penalty paid. Afterwards a double duty (2*l.*) was paid. The indenture was offered in evidence, to prove the settlement of a pauper by service under it. Held, that as it was not within 21 days, 8 Ann. c. 9., which limits the time for stamping indentures, the Court was not called up to notice the circumstances under which the stamp was affixed.

ON appeal against an order, removing *John Chaplin* from the parish of *Monks Eleigh* to the parish of *Preston*, both in the county of *Suffolk*, the sessions confirmed the order subject to the opinion of this Court on the following case:—

The pauper, *John Chaplin*, by indenture dated the 27th of April 1825, was bound apprentice for six years to *Robert Cousins* of *Monks Eleigh*. There was no premium, and the indenture at the time of the binding, and until the 6th of July 1832, had no stamp. The pauper served the six years under the indenture, residing all the time in *Monks Eleigh*. On the 6th of July 1832, 1*l.* for the stamp, and 5*l.* for the penalty, were paid to the commissioners of stamps, who caused the indenture to be stamped with a 1*l.* stamp, and a receipt to be duly written thereon for the sums of 1*l.* and 5*l.* respectively. These sums, as appeared by the cross-examination of the overseers of *Preston*, were provided and paid by the appellant parish. This evidence was received subject to an objection by the appellants' counsel to its admissibility. On the 18th of August 1832, the pauper gave a written notice to his former master *R. C.* to procure the indenture to be stamped with the double duty. (a) The master refused, and in consequence of such refusal the pauper, on the 5th of September 1832, signed a written request to the commissioners of stamps to affix the double duty, and paid them the further sum of 1*l.*, and a second 1*l.* stamp was accordingly affixed to the indenture.

(a) See stat. 20 G. 2. c. 45. s. 6.

The question for the opinion of the Court was, whether or not the pauper gained a settlement by his service under this indenture.

1834.

The King
against
The Inhabit-
ants of
PARSON.

Austin and *Gurdon* in support of the order of sessions. The indenture is void, because it was not duly stamped. It was not rendered valid by the payment of the 1*l.* duty and 5*l.* penalty, nor by the payment of the two 1*l.* duties. The duty of 1*l.* is imposed on indentures where no premium is given, by the 55 G. 3. c. 184. That act repeals the duties granted by former statutes; but enacts (s. 8.), that all the powers, provisions, clauses, regulations, directions, and penalties contained in and imposed by the several acts relating to the duties thereby repealed, shall be of the same force and effect with respect to the duties thereby granted, as far as the same are or shall be applicable, and shall be applied, &c., so far as the same shall be consistent with the provisions of that act, as fully and effectually to all intents and purposes as if the same had been therein repeated and specially re-enacted. *Rex v. Chipping Norton* (a) shews that the provisions and penalties of former stamp acts were considered to be kept in force by 44 G. 3. c. 98., which repealed former duties, but contained a clause similar to that just cited. And in *Rex v. Church Hulme* (b) it was expressly held

(a) 5 B. & A. 412.

(b) REX v. The Inhabitants of CHURCH HULME.

May 28th, 1831.

On appeal against an order of two justices, whereby *Thomas Longstaff*, and his wife and two children, were removed from *Church Hulme* to *Nether Knutsford* in the County of *Chester*, the sessions quashed the order, subject

The 55 G. 3.
c. 184. does not
repeal the pro-
vision of 8 Ann.
to c. 9. as to the
time for stamp-

ing indentures of apprenticeship; and, therefore, an indenture of apprenticeship, (a premium having been paid with the apprentice,) must be stamped with the *ad valorem* duty, within the time prescribed by the statute 8 Ann. c. 9. ss. 36, 37, 38., and if not so stamped is wholly void.

1834.

The King
against
The Inhabitants of
Preston.

held that the provisions of the statute 8 *Ann.* c. 9., and of other stamp acts, were kept in force by the 44 G. 3. c. 98., and the subsequent acts relating to stamps. Now here, the stamps imposed are to be considered as a deed stamp,

to the opinion of this Court on a case, by which it appeared that the pauper, by indenture of the 30th of September 1820, bound himself, with the consent and approbation of his father, to serve *Peter Orme*, then residing in the appellant township, as an apprentice, for five years; and *Peter Orme* in consideration of the sum of 10*l.*, which was given with the apprentice, covenanted to instruct him, &c. Under this indenture, which was duly executed by all the proper parties, the pauper served his master in the appellant township upwards of three years. The indenture was not stamped until after the order was made for the removal of the pauper and within a few days of the sessions, when it was stamped at the instance of the inhabitants of the respondent township, and not of any of the parties to the indenture, though they were living. The sessions, on production of the indenture, finding that it had been stamped with the proper duty stamp required by 55 G. 3. c. 184. sch. A, part I., (viz. 1*l.*), upon payment of a penalty of 5*l.*, within a few days before the trial of the appeal, quashed the order.

Colman and *J. H. Lloyd* in support of the order of sessions. The indenture was void, because it was not stamped within the time required by the statute 8 *Ann.* c. 9. By the 44 G. 3. c. 98. all the numerous duties upon indentures then in force were repealed after the 10th of October 1804, and one consolidated duty imposed in lieu thereof. The duties in force before that time were of two kinds. 1st. The deed stamp or duty upon the instrument: 2d. The premium stamp or ad valorem duty upon the premium contracted for with the apprentice. By the 5 *W. & M.* c. 21. s. 3. a duty of 6*d.* was imposed on the indenture; and unless the paper or parchment was stamped before it was written upon, it could be stamped afterwards only by payment of the duty and a penalty of 5*l.* Several acts followed imposing further duties and penalties. By 37 G. 3. c. 136. the penalties were consolidated, and the commissioners were required by s. 2., where no duty had been paid, or less than was due, to affix the stamp, on payment of the duty, and one penalty of 10*l.* only for every skin of parchment, &c. This is the last stamp act which specifies any particular sum as a "penalty," and this remained in force at the passing of the 44 G. 3. c. 98. But by section 8. of that act, every penalty, &c., for any offence committed against any act in force before or on the 10th of October 1804, for securing the duties under the management of the commissioners of stamps, and the several clauses

stamp, and as a stamp on an indenture without premium, under 55 G. 3. c. 184. (*Sched. part 1. tit. Apprenticeship*). The deed stamp comes within the provision of 37 G. 3. c. 136. s. 2., by which the commissioners are required, where

1834.

—
The King
against
The Inhabit-
ants of
Preston.

clauses, powers, provisions, directions, matters, and things therein contained, are declared to extend to, and are to be respectively applied and put in execution for and in respect of the several duties by this act imposed, in as full a manner to all intents and purposes, as if all and every the said clauses, &c., were particularly repeated and re-enacted in the body of this act. The other stamp acts repealing duties previously imposed contain similar provisions: viz., 30 G. 2. c. 19. s. 25.; 16 G. 3. c. 84. s. 16.; 23 G. 3. c. 88. s. 12.; 35 G. 3. c. 30. s. 5.; 37 G. 3. c. 19. s. 8.; 37 G. 3. c. 90. ss. 6. & 9.; 44 G. 3. c. 98. s. 8.; 48 G. 3. c. 149. s. 8.; 55 G. 3. c. 184. s. 8. Since the 44 G. 3. c. 98., as well as since the 37 G. 3. c. 136., the commissioners have had no power to stamp without requiring payment of a penalty of 10*l.*, as well as the duty itself. Then, as to the premium duty, that was imposed by the 8 Ann. c. 9. s. 32., which lays certain ad valorem duties: by sections 36, 37, and 38. of that act, the times are specified within which every indenture shall be stamped with the ad valorem duty payable by that act; and, by sect. 39., unless so stamped, the instrument is declared void. By the 30 G. 2. c. 45., however, relief was granted under the following conditions and restrictions. By sect. 5. where the master had neglected to pay the duty under the 8 Ann. c. 9. as required by that act, he was enabled to get it stamped *within two years* after the expiration of the apprenticeship (provided no prosecution had been commenced against him for such neglect) on payment of double the duty required by the 8 Ann. c. 9. In such case the apprentice was enabled to follow his trade, and the indenture was available in law, and might be given in evidence. By sect. 6., where the master had neglected to pay, and upon request by the apprentice refused to pay within three months, and the apprentice paid the double duty, the apprentice might sue the master for double the premium, might be discharged from his indentures, and, by sect. 7., have the same benefit of the time he had served as he might have had in case of assignment. By sect. 8., where a prosecution had been commenced against the master, if the apprentice paid the double duty within a certain time, then he was to be allowed to follow his trade, and the indenture was made available in law, and might be given in evidence. In *Rex v. The Inhabitants of Chipping Norton*, 5 B. & A. 412., the indenture was executed before the passing of the 44 G. 3. c. 98., and it was decided that it was void, because, though it was stamped at the time it was produced in evidence with the stamp required by the 55 G. 3. c. 184., it had not been stamped

1834.

—
The KING
against
The Inhabit-
ants of
Preston.

where no duty has been paid, or less than was due, and the accumulated penalties would exceed 10*l.* above the duty, to stamp the instrument upon payment of the proper duty *and one penalty of 10*l.** Here only 5*l.* have been

stamped within the time required by the stat. 8 *Ann.* c. 9., and it was held that the pauper by serving under it gained no settlement. That authority decides the present case, unless it can be shown that the provisions of the stat. 8 *Ann.* have been repealed by some subsequent statute.

Coltingham contra. The stat. 44 *G. 3.* c. 98. repeals the former stamp acts. [Lord TENNERDEN C. J. It repeals the duties imposed by those acts, but it, as well as other later stamp acts, studiously retains all the other provisions.] It retains them so far as they are not altered by that act; but the provisions in question are of that class which, as appears from the preamble, the act was intended to abolish. *Rex v. Chipping Norton*, 5 *B. & A.* 412., was the case of an indenture executed before the passing of the 44 *G. 3.* c. 98.

LORD TENNERDEN C. J. I cannot distinguish this case from *Rex v. Chipping Norton*. That case went on the ground that the provisions of the stat. 8 *Ann.* c. 9. were in force, and therefore that an indenture of apprenticeship must be stamped with the premium stamp, within the time required by that statute. That case is decisive of the present, if the provisions of the stat. 9 *Ann.* still continue in force. Now, it has not been shewn that they are repealed; on the contrary, it appears that the legislature, in the statutes repealing duties previously imposed, has studiously retained all the provisions, clauses, regulations, directions, &c. contained in the several acts relating to the duties repealed. That being so, no settlement was gained by the pauper in *Knutsford*. The order of sessions must be confirmed.

LITLEDALE J. I think the provisions in question are continued by 55 *G. 3.* c. 184. s. 8., as well as by the preceding acts.

PARKER J. The respondents were bound to shew either that the decision in *Rex v. Chipping Norton* was wrong, or that the provisions in question in stat. 8 *Ann.* c. 9. had been repealed by some act since 44 *G. 3.* c. 98. It appears to me that neither can be done.

TAUNTON J. concurred.

Order of sessions confirmed.

paid

paid as a penalty. (a) With regard to the second stamp, if it was in the nature of a premium stamp, subject to the regulations of the 8 *Ann.* c. 9. (b), the payment of 2*l.*, the double duty, does not set up the indenture as a valid instrument. It could only be made so by virtue of some of the provisions on this head in 20 *G. 2.* c. 45., which are kept in force by the subsequent stamp acts, like the clauses of 8 *Ann.* c. 9., to which they relate. Now of those provisions of the 20 *G. 2.* c. 45., the only ones applicable to the facts of this case are sections 6. and 7., and these merely give certain remedies and advantages to the apprentice; they do not render the indenture available unless proceedings have been taken under section 8., which has not been done here.

1834.

The King
against
The Inhabit-
ants of
Paxton.

Biggs Andrews, and *Byles*, contra. In *Rex v. Chipping Norton* (c), as well as in *Rex v. Church Hulme* (d), a premium was paid, and, consequently, those cases came within the provision of 8 *Ann.* c. 9, sects. 37, 38, 39, which require that all indentures containing the sum given as a premium, shall be indorsed and stamped within a certain time after date, &c., or else shall be void. That is the distinction. Where an instrument is to be void unless stamped within a given time, the Court will enquire into the time of stamping; otherwise not.

(a) It was stated that this arose from a mistaken practice of the commissioners since the passing of the 44 *G. 3.* c. 98., in explanation of which reference was made to the evidence of Mr. *Sykes* before the parliamentary commissioners of revenue inquiry. See *Coventry on Stamps*, Appendix, p. 1x.

(b) The duty on indentures of apprenticeship with a premium, imposed by 8 *Ann.* c. 9. s. 32., and at first given only for five years, is made perpetual, with the powers, provisions, &c., relating to it, by 9 *Ann.* c. 21. s. 7.

(c) 5 *B. & A.* 412.

(d) *Antè*, 1023, note (b).

Here

1694.

*The King
against
The Inhabit-
ants of
Petersham.*

Here no premium was paid, and therefore the provisions of the statute of *Anne*, as to time, do not apply. (They were then stopped by the Court.)

DENMAN C. J. The main question intended to be raised does not arise. When an act of parliament requires a stamp to be affixed within a certain time, and declares that the instrument shall be void unless stamped within that time, it may be necessary to enquire into the time when the stamp was affixed; but when the question is merely, whether the instrument be admissible in evidence as bearing a stamp, it is sufficient if it has the proper stamp, and we cannot enquire into the *time when* it was affixed.

LITLEDALE J. The rule, as to receiving documents in evidence is, that the document, at the time when it is produced, should have the proper stamp affixed.

TAUNTON J. concurred.

PATTESON J. I am sorry that a very ingenious argument has been thrown away in this case. The courts have enquired *when* the penalty was paid in cases where that was material, but no case has been pointed out in which they have asked whether the right penalty has been paid. Suppose no penalty at all had been paid, would the Court enquire into that circumstance if they saw that the document had a proper stamp?

Order of sessions quashed. (a)

(a) See *Rea v. Ide*, 2 B. & Ald. 866.

1834.

REES, Gent., One, &c., against M. MORGAN,
Executrix of A. MORGAN, deceased.

Thursday,
January 23d.

ASSUMPSIT for work and labour done by the plaintiff as attorney for the testator. Plea, that the defendant had fully administered, and that she had not then, nor on the day of exhibiting the bill of the plaintiff in this behalf, or at any time since, had, any goods or chattels which were of *A. Morgan*, deceased, at the time of his death, in her hands to be administered. Replication, that the defendant, on the day of exhibiting the bill of the plaintiff in this behalf, had divers goods and chattels, which were of *A. Morgan*, deceased, in her hands as executrix to be administered; and upon this issue was joined. At the trial before *Patteson J.*, at the *Carmarthen* Spring assizes 1833, the plaintiff proved his bill of costs for business done by him as attorney for the testator to the amount of 32*l.* The defendant, in support of the plea of plene administravit, tendered evidence of various payments made by her on account of the testator up to the 23d of *February* 1833, when the declaration was filed. The plaintiff put in the writ of summons, which appeared to have been sued out on the 8th, and served on the 10th of *December* 1832. In it the defendant was not described as executrix. The learned Judge was of opinion, that evidence of payments made by the defendant after the service of the writ on her was inadmissible; and a verdict having been found for the plaintiff for 20*l.* damages, *Chilton*, in *Easter* term last, obtained a rule nisi for a new trial, on the ground

After the passing of the act for the uniformity of process, 2 W. 4. c. 39., which directs, "that all personal actions, where it is not intended to hold the defendant to bail, &c. shall be commenced by writ of summons;" an executrix pleaded, to an action of assumpsit, plene administravit, and no assets on the day of exhibiting the bill of the plaintiff. The plaintiff in his replication tendered issue in the words of the plea: Held, that the words exhibiting the bill, upon these pleadings, meant the commencement of the suit by writ of summons, and not the filing of the declaration; and, therefore, that evidence of payments made by the executrix between the times of suing out the writ and filing the declaration, was inadmissible.

1834.

REES
against
MORGAN.

ground that the learned Judge had improperly rejected the evidence of payments made by the defendant after the issuing of the writ of summons, but before the filing of the declaration. In moving for the rule he contended, that the true meaning of the issue joined between the parties was, whether the defendant had any goods of the testator to be administered on the day of filing the declaration. He cited *Com. Dig. tit. Administration, C. 2.*, (p. 340.), to shew that "if a suit be commenced by one creditor, the executor may pay the other, till he (the executor) has notice of the suit" (referring to *Corbet's* case, 1 *Leon.* 312. and 2 *Leon.* 60.); also 1 *Rolle's Abr.* 927. tit. *Executors*, T. pl. 2. and 1 *Dyer*, 32 a. note 2. In *Com. Dig. tit. Administration, C. 2.*, (p. 340.), it is stated that an arrest upon a latitat, subpoena out of the Exchequer, &c., is not notice, if it do not express the cause of action. Here it is consistent with the pleadings, that the defendant may not have had notice of any claim against her in her character of executrix until the filing of the declaration.

John Evans and *E. V. Williams* now shewed cause. The plea is undoubtedly informal, and would have been bad upon demurrer. The proper form of pleading would have been to allege that at the time of the commencement of the suit the defendant had no assets to administer. But the plea is sufficient in this stage of the proceeding. Before the act for uniformity of process, 2 *W. 4. c. 39.*, this form of pleading would have been proper, unless the action had been commenced by original, in which case it would have been necessary for the defendant to shew that she had fully administered to assets before the commencement of the suit. Here, both parties have treated the ex-

hibiting

hibiting of the bill as the commencement of the suit. Unless the expression was used in that sense by the defendant, her plea is bad. The plaintiff, by not replying the issuing of the writ, and the service thereof on the defendant, and that she then had assets, treats the exhibiting of the bill as the commencement of the suit. The words "at the time of exhibiting the bill," must mean either the commencement of the suit, or the filing of the declaration, or they must be wholly insensible. If they mean the commencement of the suit, then, the defendant could not, under this plea, shew payments made by her after the commencement of, but before she had notice of the suit, for that would not be the matter in issue. If she had intended to rely on such payments, she should have pleaded accordingly. In *Com. Dig. tit. Administration, C. 2.*, (p. 340.) citing *Dyer 32. a.* (in margin), it is said, "if an executor has paid since the action, before notice, he ought to plead that he had not notice till such a day, and plene administravit before: semble." [*Littledale J.* It would seem from *Com. Dig. tit. Pleader, 2 D. 9.*, (p. 565.), that before the pleadings were in English, the words used in pleading plene administravit were *nulla habet bona nec habuit die impetrationis billæ*; and *Gewen v. Roll (a)* is cited, where such a plea, without saying *nec unquam postea*, was held to be bad.] If the words "*the exhibiting of the bill*" meant the filing of the declaration, and not the commencement of the suit, the plea would have been bad; because any payment made by an executrix after action brought is a devastavit. The words of the plea ought now to be so construed as to make it a valid defence. Supposing the issue tendered by the replication to be insensible, the

1834.

Reas
against
MORGAN.

(a) *Cro. Jac.* 132.

1834.

Rees
against
Morgan.

defendant cannot have a repleader, because she made the first fault in pleading. *Tidd's Pr.* 9th edit. 921.

Chilton contra. It is not incumbent on the defendant to shew that the words in the plea necessarily mean the time of filing the declaration. It lies upon the plaintiff, who has tendered the issue in those words, and upon [whom the proof of the affirmative lies, to affix some definite meaning to them. Before the act for the uniformity of process, the *exhibiting of the bill* was synonymous with the filing of the declaration. If the plaintiff, instead of tendering issue, had replied that the defendant had assets at the time of the commencement of the suit, the latter might have rejoined that she had then no notice of action: *Dyer*, 32. a. note 2. The words, if they have any meaning, must have a meaning analogous to that which they had in courts of law, before the act for uniformity of process passed, and that was the filing of the declaration. [*Patteson J.* In all personal suits where an officer or prisoner of the King's Bench was defendant, the course of proceeding was for the plaintiff to exhibit his bill against the defendant without suing out any original; but as the Court had no primary jurisdiction in actions on contracts, when such an action was contemplated against a person not privileged as an officer or prisoner, the course was for the plaintiff to cause him to be arrested on a fictitious charge of trespass, by a bill of *Middlesex* or *latitat*; upon such an arrest, the defendant was committed to the custody of the Marshal; and the plaintiff then filed his bill against him in the particular suit, and thereby commenced that suit.] If the words, "exhibiting the bill," be construed to mean the commencement of the suit, the effect may be to make the defendant liable, although she may have exhausted the

the

the assets in paying debts of the testator after the commencement of the action, and before notice; but it is clear from the authorities cited in moving for the rule, that executors may pay debts pending a writ against them if they have not notice of it.

1834.

Rees
against
Morgan.

DENMAN C. J. The evidence was rejected by the learned Judge at the trial, on the ground that the issue joined between these parties substantially was, whether the defendant had any assets before the commencement of the suit, that is, the suing out of the writ of summons. The words *the exhibiting of the bill* in the plea (in this sense) state a defence to the action; but they do not if they are understood in the other sense, *filing the declaration*. I think we must understand the defendant to have used them in that sense in which they will be effective. And considering that before the Uniformity of Process Act, 2 W. 4. c. 39., the words "the exhibiting of the bill," might be synonymous with the words "commencement of the suit," I think we do no violence to the language of the plea by putting that construction on them. The evidence tendered, therefore, was immaterial, and was properly rejected by the learned Judge.

LITLEDALE J. Before the Uniformity of Process Act, the exhibiting of a bill was generally the commencement of the suit. That expression, when used in pleading, was only an informal mode of saying "the commencement of the suit." It is contended now that it ought not to be understood in that sense, because the commencement of the suit, since the act for uniformity of process, is by writ of summons, and not by exhibiting a bill. But we must give some effect and meaning to these words, as used by the parties to this suit, if we can.

1834.

REES
against
MORGAN.

They certainly have not the technical meaning which they formerly had; but many words, which formerly had a technical meaning, are now used in a different sense; and the popular meaning of these words is, the commencement of the suit. A bill and declaration were not necessarily the same thing: the bill preceded the declaration, and the declaration pre-supposed a bill. In proceeding against a member of the House of Commons, or against a prisoner in the custody of the marshal, the bill was clearly the formal commencement of the suit. Whether a latitat or bill of *Middlesex* was the commencement of the suit, is very doubtful. In *Tidd's Practice*, 9th edit. p. 146., it is said that "anciently the process in trespass was founded on a plaint or queritur entered on the records of the court; and the first process thereon was a precept in the nature of an attachment, upon which the sheriff returned, either that he had attached the defendant, or that he had nothing by which he could be attached. On the latter return, if the defendant did not appear, there issued a bill of *Middlesex*; and, if the defendant did not reside in the county, a latitat." Though the language used in the plea is not, strictly speaking, applicable to the existing state of things; yet, as the plaintiff did not demur to the plea, but tendered an issue upon it, I think that it may be taken in a general popular sense to mean *the commencement of the suit*; and if that be the meaning, then evidence of payments made by the defendant between the service of the writ of summons and the filing of the declaration was inadmissible.

TAUNTON J. It has been said that an executrix may plead to an action by a creditor, payment of debts of the testator after the commencement of a suit, but before she

she had notice of the action; here, however, she has not done so, but merely pleaded plene administravit before the exhibiting of the bill; and if the latter words mean the commencement of the suit, the only question is, whether she had then fully administered. Since the passing of the 2. W. 4. c. 39., the suing out of the writ of summons is undoubtedly, in strictness, the commencement of the suit; the words "exhibiting the bill" were first used by the defendant in her plea, and they must be understood in a sense appropriate to the purpose of making the plea an effective defence. So construing them, they must be taken to mean the commencement of the suit by writ of summons. We do no injury to the defendant by supposing that she meant to plead a good plea, and not a bad one.

1834.

 REES
 against
 MORGAN.

PATTERSON J. It seems to me that the plaintiff has totally failed in shewing that, before the late act, the exhibiting of the bill meant the filing of the declaration. The mode of pleading the Statute of Limitations is to aver, that the cause of action did not accrue within six years before the *exhibiting of the bill* against the defendant. There, the exhibiting of the bill means the commencement of the suit (a). So here, the defendant, by stating that *before the exhibiting of the bill* she had fully administered, pleaded in effect "that she had fully administered before the commencement of the suit;" and the plaintiff, by taking issue upon that plea, treated those words in the same sense (b). The rule must be discharged.

Rule discharged.

(a) *Granger v. George*, 5 B. & C. 149.

(b) See *Wood v. Newton*, 1 Wils. 141., where the judgment of the Court of K. B. proceeded on a similar ground.

1834.

Saturday,
Jan. 25th.

WARMAN *against* FAITHFULL.

An instrument in writing, whereby *A.* agreed to let premises to *J.* for seven, fourteen, or twenty-one years (commencing at *Christmas day* then next), at the option of *B.*, at the yearly rent of 24*l.*, payable quarterly, the first payment to be made at the ensuing *Lady-day*, free of rates and taxes; and whereby *B.* stipulated, if he should be desirous of putting an end to the agreement at either of the terms before specified, to give six months' notice; and that he, *B.*, should pay all the expences of preparing a lease for either of the terms above stated:— is a lease, and not a mere agreement for a lease.

REPLEVIN. The declaration charged a taking of the plaintiff's goods in his dwelling house. Avowry, that the plaintiff, for two quarters of a year ending the 24th of *June* 1832, held the dwelling house as tenant to the defendant by virtue of a demise thereof to the plaintiff, at the rent of 24*l.* payable quarterly, and that defendant distrained for half a year's rent. Plea, that the plaintiff did not hold and enjoy the said dwelling house as tenant thereof to the defendant under the supposed demise. At the trial before *Tindal C. J.*, at the *Surrey* Spring assizes 1833, it appeared that the plaintiff occupied the premises under the following instrument signed by the plaintiff and defendant, and stamped with a deed stamp. "Memorandum of an agreement, made and entered into this 28th of *November* 1831, by and between *John Faithfull* and *W. Warman*, that is to say, he the said *J. Faithfull* agrees to let to the said *W. Warman*, for a term of seven, fourteen, or twenty-one years, (commencing at *Christmas-day* 1831,) at the option of the said *W. Warman*, two attached messuages or tenements, with the gardens thereto belonging, situate at *Kingston Bottom* in the parish of *Ham* in the county of *Surrey*, at the yearly rent of 24*l.*, payable quarterly; the first payment to be made at *Lady-day* 1832; free and clear of all rates, taxes, or charges, whether parliamentary, parochial, or otherwise. It is also agreed that *W. Warman* is to paint the inside of the said messuages or tenements every seven years, and the outside

outside every five years, and to keep the said messuages or tenements in good and substantial reparation; and that whatever buildings or additions may at any time be erected or built on the said premises by *W. Warman* shall be left by him when he quits possession of the same, and shall not on any account be removed; and if *W. Warman* should be desirous of putting an end to this agreement at either of the said terms before specified, he hereby binds himself to give to the said *John Faithful* six months' notice in writing of the same. Lastly, it is agreed that *W. Warman* is to pay all the expences of preparing lease for either of the terms above stated." No rent had been paid. It was objected by the plaintiff that this instrument did not amount to a present demise. The learned judge thought that it was a lease, and directed a verdict to be taken for the defendant for 12l., the half year's rent; but reserved liberty to the plaintiff to move to enter a verdict for 4 guineas. In last *Easter* term plaintiff obtained a rule nisi, on the ground that the circumstance of a future lease having been stipulated for was conclusive against the implication of any present demise. *Dunk v. Hunter (a)* was cited.

1834.

WARMAN
against
FAITHFULL.

Thesiger now shewed cause. The instrument in question amounted to an actual demise, and not to a mere prospective agreement for a lease. The general rule is, that where the words of an instrument are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, amount

(a) 5 B. & A. 322.

1834.

The King
against
The Inhabit-
ants of
Pittston.

Here no premium was paid, and therefore the provisions of the statute of *Anne*, as to time, do not apply. (They were then stopped by the Court.)

DENMAN C. J. The main question intended to be raised does not arise. When an act of parliament requires a stamp to be affixed within a certain time, and declares that the instrument shall be void unless stamped within that time, it may be necessary to enquire into the time when the stamp was affixed; but when the question is merely, whether the instrument be admissible in evidence as bearing a stamp, it is sufficient if it has the proper stamp, and we cannot enquire into the *time when* it was affixed.

LITLEDALE J. The rule, as to receiving documents in evidence is, that the document, at the time when it is produced, should have the proper stamp affixed.

TAUNTON J. concurred.

PATTESON J. I am sorry that a very ingenious argument has been thrown away in this case. The courts have enquired *when* the penalty was paid in cases where that was material, but no case has been pointed out in which they have asked whether the right penalty has been paid. Suppose no penalty at all had been paid, would the Court enquire into that circumstance if they saw that the document had a proper stamp?

Order of sessions quashed. (a)

(a) See *Ben v. Ide*, 2 B. & Ad. 866.

1834.

REES, Gent., One, &c., against M. MORGAN,
Executrix of A. MORGAN, deceased.

Thursday,
January 23d.

ASSUMPSIT for work and labour done by the plaintiff as attorney for the testator. Plea, that the defendant had fully administered, and that she had not then, nor on the day of exhibiting the bill of the plaintiff in this behalf, or at any time since, had, any goods or chattels which were of *A. Morgan*, deceased, at the time of his death, in her hands to be administered. Replication, that the defendant, on the day of exhibiting the bill of the plaintiff in this behalf, had divers goods and chattels, which were of *A. Morgan*, deceased, in her hands as executrix to be administered; and upon this issue was joined. At the trial before *Patteson J.*, at the *Carmarthen* Spring assizes 1833, the plaintiff proved his bill of costs for business done by him as attorney for the testator to the amount of 32*l.* The defendant, in support of the plea of plene administravit, tendered evidence of various payments made by her on account of the testator up to the 23d of *February* 1833, when the declaration was filed. The plaintiff put in the writ of summons, which appeared to have been sued out on the 8th, and served on the 10th of *December* 1832. In it the defendant was not described as executrix. The learned Judge was of opinion, that evidence of payments made by the defendant after the service of the writ on her was inadmissible; and a verdict having been found for the plaintiff for 20*l.* damages, *Chilton*, in *Easter* term last, obtained a rule nisi for a new trial, on the ground

After the passing of the act for the uniformity of process, 2 W. 4. c. 39., which directs, "that all personal actions, where it is not intended to hold the defendant to bail, &c. shall be commenced by writ of summons;" an executrix pleaded, to an action of assumpsit, plene administravit, and no assets on the day of exhibiting the bill of the plaintiff. The plaintiff in his replication tendered issue in the words of the plea: Held, that the words exhibiting the bill, upon these pleadings, meant the commencement of the suit by writ of summons, and not the filing of the declaration; and, therefore, that evidence of payments made by the executrix between the times of suing out the writ and filing the declaration, was inadmissible.

1834.

RES
against
MORGAN.

ground that the learned Judge had improperly rejected the evidence of payments made by the defendant after the issuing of the writ of summons, but before the filing of the declaration. In moving for the rule he contended, that the true meaning of the issue joined between the parties was, whether the defendant had any goods of the testator to be administered on the day of filing the declaration. He cited *Com. Dig. tit. Administration, C. 2.*, (p. 340.), to shew that "if a suit be commenced by one creditor, the executor may pay the other, till he (the executor) has notice of the suit" (referring to *Corbet's case*, 1 *Leon.* 312. and 2 *Leon.* 60.); also 1 *Rolle's Abr.* 927. tit. *Executors*, T. pl. 2. and 1 *Dyer*, 32 a. note 2. In *Com. Dig. tit. Administration, C. 2.*, (p. 340.), it is stated that an arrest upon a latitat, subpoena out of the Exchequer, &c., is not notice, if it do not express the cause of action. Here it is consistent with the pleadings, that the defendant may not have had notice of any claim against her in her character of executrix until the filing of the declaration.

John Evans and *E. V. Williams* now shewed cause. The plea is undoubtedly informal, and would have been bad upon demurrer. The proper form of pleading would have been to allege that at the time of the commencement of the suit the defendant had no assets to administer. But the plea is sufficient in this stage of the proceeding. Before the act for uniformity of process, 2 *W. 4. c. 39.*, this form of pleading would have been proper, unless the action had been commenced by original, in which case it would have been necessary for the defendant to shew that she had fully administered to assets before the commencement of the suit. Here, both parties have treated the ex-

hibiting

hibiting of the bill as the commencement of the suit. Unless the expression was used in that sense by the defendant, her plea is bad. The plaintiff, by not replying the issuing of the writ, and the service thereof on the defendant, and that she then had assets, treats the exhibiting of the bill as the commencement of the suit. The words "at the time of exhibiting the bill," must mean either the commencement of the suit, or the filing of the declaration, or they must be wholly insensible. If they mean the commencement of the suit, then, the defendant could not, under this plea, shew payments made by her after the commencement of, but before she had notice of the suit, for that would not be the matter in issue. If she had intended to rely on such payments, she should have pleaded accordingly. In *Com. Dig. tit. Administration, C. 2.*, (p. 340.) citing *Dyer 32. a.* (in margin), it is said, "if an executor has paid since the action, before notice, he ought to plead that he had not notice till such a day, and plene administravit before: semble." [*Littledale J.* It would seem from *Com. Dig. tit. Pleader, 2 D. 9.*, (p. 565.), that before the pleadings were in English, the words used in pleading plene administravit were *nulla habet bona nec habuit die impetrationis billæ*; and *Gewen v. Roll (a)* is cited, where such a plea, without saying *nec unquam postea*, was held to be bad.] If the words "*the exhibiting of the bill*" meant the filing of the declaration, and not the commencement of the suit, the plea would have been bad; because any payment made by an executrix after action brought is a devastavit. The words of the plea ought now to be so construed as to make it a valid defence. Supposing the issue tendered by the replication to be insensible, the

1834.

—
 Regs
 against
 MORGAN.

(a) *Cro. Jac.* 132.

1834.

CHILD
against
CHAMBERLAIN.

beside such money as he shall take above the sum of four pence." The learned Judge thought the sums in question were not taken for keeping in pound, impounding, or poundage of a distress, within the meaning of that statute; but told the jury to find for the plaintiff, if they thought the sums charged and taken were excessive. The jury found for the plaintiff, damages one farthing. The learned Judge reserved leave to the plaintiff to move to enter a verdict for the difference between *3l. 9s. 6d.*, the sum taken by the defendants, and four pence, the sum allowed by the statute.

Dunbar in this term moved according to the leave reserved (a). There was a sum exceeding four pence taken for the poundage of a distress, within the meaning of the stat. 1 *Ph. & M. c.* 12. s. 2.; for so long as the goods distrained continue in custody of the law they are impounded. The 57 *G. 3. c.* 93. s. 1. enacts, "that no person making any distress for rent, where the sum demanded and due shall not exceed 20*l.* for and in respect of such rent, shall have, take, or receive out of the produce of the goods distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress than such as are fixed in the schedule thereunto annexed," viz: — three shillings for making the distress, and two shillings and sixpence per day for the man in possession: but that statute applies only to cases where the sum is less than 20*l.*

Cur. adv. vult.

(a) Before *Denman C. J., Littledale, Taunton, and Patteson Js.*

DENMAN

DENMAN C. J. now delivered the judgment of the Court.

1834.

CHILD
against
CHAMBERLAIN.

We are of opinion that there should be no rule in this case. At the time of 1 & 2 *Ph. & M. c.* 12., goods distrained could not be impounded on the premises, but were always taken to a public pound; and that statute, by sect. 1., enacts that no distress of cattle shall be driven out of the hundred, &c., where the distress is taken, except to a pound overt within the shire, and not above three miles' distance from the place where the distress was taken, and that no cattle or other goods distrained shall be impounded in several places. Sect. 2., therefore, which provides "that no person shall take for the keeping in pound, impounding, or poundage of any manner of distress, above the sum of 4*d.*," can only apply to cases within sect. 1., where the goods distrained are taken to a public pound. Until the passing of 1 & 2 *W. & M. sess.* 1. *c.* 5., goods distrained for rent could not be sold, but only detained as pledges for enforcing the payment of the rent; that statute authorises the sale of them; and the subsequent statute, 11 *G. 2. c.* 19. *s.* 10., recites that "great inconveniencies frequently arise to landlords taking distress for rent, in removing goods distrained off the premises, in cases where by law they may not be impounded and secured thereupon;" and then authorises any person lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made on such part of the premises chargeable with rent as shall be most fit and convenient for the impounding and securing of the same, and to appraise, sell, and dispose of the same upon the premises in like manner as any person might then do off the premises by virtue of the 2 *W. & M. c.* 5. Here the goods were impounded

on

1894.
1891
-CHIEF
-CHIEF
CHAMBERLAIN.
1894

on the premises chargeable with the rent, by virtue of statute 11 G. 2. c. 19. That being so, we think the statute 1 & 2 Ph. & M. does not apply to this case, more especially as by the 57 G. 3. c. 93. it is provided that in case of a distress for rent under 20*l.*, no more than certain sums fixed by the schedule and much exceeding the sum of 4*d.* mentioned in the older statutes, shall be taken.

Rule refused.

Monday,
Jan. 27th.

A brewer, who delivered beer to be used in a particular public-house, on the credit of a person not the licensed keeper of the house, may maintain an action against the latter, for goods sold and delivered.

except the licensed keeper of the house, primarily liable for it. Lord Tenterden there said, "I am of opinion that the plaintiffs are not entitled to recover for the beer."

BROOKER against WOOD.

DEBT for goods sold and delivered. At the trial before Lord Lyndhurst C. B., at the Sussex Spring Assizes 1855, it appeared that the action was brought by the plaintiff, a brewer, to recover 36*l.* for beer supplied to the defendant. It appeared that the defendant's daughter resided in, and carried on, an inn at *Blatchington*, for the use of which the beer was supplied. She conducted the business under a licence to sell beer, granted by the magistrates to her. The defendant re-

ceived, or shared in, the profits. It was contended, first, on the evidence, that the credit was given to the daughter, not to the defendant; and, secondly, that even if it was given to the defendant, the plaintiff could not recover, because it would be a fraud on the licensing system to allow him to do so; and for this *Mason and Others v. Humphries* (a) was cited. The jury found that the credit was given to the defendant, and not to the

(a) 1 M. & M. 152.

daughter. The Lord Chief Baron, on the authority of the case cited, directed a nonsuit, but reserved liberty to the plaintiff to move to enter a verdict. A rule nisi having been obtained in last *Easter* term,

1834.

—
BROOKER
against
WOOD.

Platt, in this term, shewed cause (*a*). *Meux and others v. Humphries* (*b*) is an authority to shew that the plaintiff is not entitled to recover. There a brewer had delivered beer to be used at a public-house, and Lord *Tenterden* ruled at nisi prius that he could not make any person, except the licensed keeper of the house, primarily liable for it. Lord *Tenterden* there said, "I am of opinion that the plaintiffs are not entitled to recover for the beer; it would be a fraud on the licensing system to allow them to do so. The magistrates are to exercise their discretion as to the person to whom they give a licence: if, however, the brewer is to sell beer for the house to another person, this is in effect to evade the licence, and make that person the retailer. The brewer may, if he is not satisfied with the security of the keeper of the public-house, take another person as a surety for the payment of his demand; but he must not make him the principal debtor."

W. H. Watson, contra. In *Meux v. Humphries* (*b*), a mere opinion was expressed by Lord *Tenterden*, at nisi prius, that the action was not maintainable; but he reserved the point. A juror was afterwards withdrawn, so that the opinion of the Court could not be taken. The question in this case depends on the 9 G. 4. c. 61. s. 18., which enacts "that every person who shall sell, barter,

(a) Before Lord Denman C. J., *Littledale, Taunton, and Patteson* Js.

(b) 1 M. & M. 132.

1834.

—
BROOKER
against
WOOD.

exchange, or for valuable consideration otherwise dispose of, any exciseable liquor by retail, to be drunk or consumed in his house or premises, or shall permit or suffer any exciseable liquor to be sold, bartered, exchanged, or otherwise disposed of for valuable consideration, by retail, to be drunk or consumed in his house or premises, *without being duly licensed so to do*; and that every person, being duly licensed, who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, or shall permit or suffer to be sold, bartered, exchanged, or otherwise disposed of for valuable consideration, any exciseable liquor by retail, to be drunk or consumed in his house or premises, not being the house or premises specified in such licence; shall respectively for every such offence, on conviction before one justice, forfeit and pay any sum not exceeding 20*l.*, nor less than 5*l.*, together with the costs of the conviction." That act, therefore, merely imposes a penalty on a person carrying on the trade of an alehouse-keeper without licence, or suffering another to do so in his name. That is an excise regulation, and a contract which is merely a breach of an excise regulation is not void: *Brown v. Duncan* (a), *Johnson v. Hudson*. (b) *Hodgson v. Temple* (c), and *Wetherell v. Jones* (d), are also authorities for the plaintiff. The object of the legislature was that the magistrates should have some responsible person to whom they might look in case of any irregularity in conducting the business of the house. No act of parliament prevents the licensee from carrying on the business for the benefit of another. If the licensee commits a breach of a mere revenue regu-

(a) 10 B. & C. 93.

(b) 11 East, 180.

(c) 5 Taunt. 181. See *Forster v. Taylor*, antè, 887.

(d) 3 B. & Ad. 221.

lation,

lation, he subjects himself to a penalty; and if he suffers any misconduct in his house, he may have his licence revoked.

1834.

BROOKER
against
WOOD.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. The nonsuit in this case proceeded on the authority of *Meux v. Humphries (a)*. There Lord Tenterden expressed an opinion that a brewer, who delivered beer to be used in a particular public-house, could not make any person except the licensed keeper of the house primarily liable, so as to maintain an action against him for goods sold and delivered, because it would be a fraud on the licensing system to allow him so to do. We have considered the matter very fully, and are of opinion that allowing the plaintiff to recover, in this case, the price of the beer sold to the defendant for the purpose of being re-sold in a public-house carried on for his benefit, but of which he was not the licensee, will not operate as a fraud on the licensing system. The object of that act was to enable the magistrates to know the person who conducted the business, and to have a control over that person. Here the licensee conducted the business; the magistrates, therefore, had a control over her. The circumstance of another person having a share in the profits of the trade, does not, in any degree, interfere with the control which the magistrates are authorised to exercise over the licensee. The rule, therefore, for setting aside the verdict must be made absolute.

Rule absolute.

(a) 1 M. & M. 132.

1834.

Monday,
Jan. 27th.

HOPWOOD against GEORGE WATTS.

Issue was entered in a cause, and docketed according to the practice of the office of judgments. The plaintiff, in 1828, recovered damages and costs, and entered final judgment on the roll, but the judgment, according to a practice said to have prevailed for 100 years, was not docketed as required by 4 & 5 W. & M. c. 20. s. 2. On application to the Court in 1834, to order the judgment to be docketed nunc pro tunc:

Held, that the Court had no power to make such order.

A RULE nisi had been obtained calling upon *Edward Watts* and *Hannah Watts*, the committees of the defendant, a lunatic, and *J. Hyatt*, the mortgagee of his estate, to shew cause why the judgment in this cause should not be docketed nunc pro tunc. The action was commenced on the 31st of *March* 1827, and issue was joined in *Easter* term of the same year, and notice of trial given for the sittings after that term; the issue was entered as of *Easter* term 1827, and docketed at the same time. The plaintiff obtained a verdict at the sittings after *Hilary* term 1828, for 75*l.*, and his costs were taxed by the Master, and final judgment signed on the 31st of *May* 1828, when the Master gave his interlocutor for 158*l.* damages and costs. Final judgment was entered on the roll, and carried into the Treasury chamber on the 9th of *December* 1828.

In *May* 1828, *George Watts* was found by inquisition to have been a lunatic since the 31st of *October* 1826, and on the 16th of *June* 1828, *Edward Watts* and *Hannah Watts* were appointed committees of his estate. Pursuant to an order of the Court of Chancery, made in *August* 1829, that estate was mortgaged, on the 1st of *May* 1830, to *Hyatt* for 1400*l.* The interest of the mortgage was 70*l.* per annum. The plaintiff *Hopwood* having afterwards become bankrupt, his assignees revived the judgment by scire facias, and sued out an elegit, under which the sheriff delivered to them legal possession of a moiety of the defendant's lands. An action

was

was subsequently brought in the court of Exchequer by the assignees of *Hopwood* against *Edward Watts*, to recover from the latter the rents of the moiety so delivered by the sheriff, and which rents were received by *E. Watts*. The plaintiffs (the assignees) were nonsuited, on the ground that the mortgagee was entitled to preference over them, because their judgment had not been docketed (a).

The affidavits in support of the present rule stated the practice to be, whenever issue is joined between parties, upon entry of the same, to deliver a docket paper thereof to the clerk of the judgments, who enters the same in a book kept by him at the judgment office for that purpose; that it has not been the practice to docket any judgment on such issue; but that on signing judgment an entry is made of such judgment in a book kept for that purpose, and that a number is fixed to the issue so docketed as above, corresponding with the number of the judgment-roll in the treasury, and that, by the entry and docketing, all persons searching have an equally good opportunity of discovering judgments as if the judgments themselves had been docketed as well as the issue; and the affidavits further stated, that for the last 100 years it had been the practice not to docket judgments after verdict, but the issues only, and that the issues so docketed were entered in a book kept for that purpose; that the numbers affixed to each issue afforded an immediate reference to the roll upon which the final judgment was entered up; that all persons searching at

1834.

Herwood
against
Watts.

(a) *Brühlwald and Another v. Watts*, 2 Tyrwh. 293., 2 Cro. & J. 318. The plaintiffs had a verdict, subject to the point of law, but the Court directed a nonsuit to be entered. See the evidence in that case as to the practice of docketing. Also *Davis v. The Earl of Strathmore*, 16 Ves. 419.

1834.

—
HORWOOD
against
WATTS.

the office for incumbrances, so far as related to judgments after verdict, searched for the issues so entered and docketed, and upon finding such issues so entered and docketed, searched for final judgments thereon, and could make enquiries of the plaintiff's attorney respecting the result of the suit; and that by these means a full opportunity was given to all persons to discover such judgments, if any.

The affidavits in answer to the rule stated, that final judgments were frequently docketed after trial, and taxation of costs on the *postea*, by applying to the clerk of the judgments, and informing him of the amount of damages and costs recovered in the action, and that the clerk of the judgments thereupon made the docket of the issue in such action a docket of the judgment, by adding such particulars thereto, for which he was paid a fee of 6*d.* That the clerk of the judgments never so entered the docket of the judgment, unless he was so applied to by the plaintiff's attorney, and paid such fee of 6*d.*: that the practice was, where it was intended to affect lands by judgments, to docket them in the manner above described: that when it was intended to enter up final judgment on the roll after trial and verdict, the *postea*, with the Master's allocatur thereon, was left with the clerk of the treasury at *Westminster Hall*, who entered up the final judgment; but these entries were totally distinct from the dockets of the judgment which are entered and kept at the King's Bench office in the *Temple*.

Joseph Addison now shewed cause (*a*). The 4 & 5 *W. & M. c. 20. s. 2.* (made perpetual by the 7 & 8 *W. 3. c. 36.*

(*a*) Before Denman C. J., Littledale, Taunton, and Patteson Js.

s. 3.(a)), enacts, that the clerk of the doggets of the Court of King's Bench shall make into an alphabetical dogget by the defendants' names a particular of all judgments, which shall contain (inter alia) the debt, damages, and costs recovered thereby. Here there has been a docketing of the issue only, not of the judgment. The judgment, therefore, does not affect the lands as to a mort-

1834.

HOPWOOD
against
WATTS.

(a) Sect. 2. enacts, as to judgments in K. B., that the clerk of the doggets shall, before the last day of every *Easter* term, make into an alphabetical dogget by the defendants' names, a particular of all judgments for debt by confession, non sum informatus, or nil dicit, entered of *Hilary* term preceding, which shall contain the names of the plaintiffs and defendants, their places of abode, and title, trade, or profession (if any such be in the record of the said judgments), and the debt, damages, and costs recovered thereby, and the venue and the number roll of the entry thereof: That the clerk of the judgments shall, within ten days before the time aforesaid, bring to the clerk of the doggets notes in writing of all the judgments by him entered of *Hilary* term upon verdicts, writs of inquiry, &c., to the end that the same may be by the clerk of the doggets entered in the doggets before mentioned in manner and form aforesaid; and also that the respective officers shall, before the last day of every *Michaelmas* term, make and cause to be made the like doggets containing all such judgments of *Easter* and *Trinity* term then last past, and the names of the plaintiffs and defendants, titles and additions, debts and damages, in all things as aforesaid; and, before the last day of every *Hilary* term, cause the like dogget to be made of the judgments of *Michaelmas* term, with the names of the plaintiffs and defendants, titles and additions, debts and damages, in all things as aforesaid; and it is then enacted, that the doggets shall be fairly put into and kept in books in parchment in the office of the clerk of the doggets, to be searched and viewed by all persons, at all reasonable times, paying to the clerk of the doggets for every term's search for judgments against any one person, 4d.; upon pain that every clerk of the doggets shall for every term in which he shall neglect his duty in the premises forfeit 100l.

Sect. 3. enacts, that no judgment not doggetted and entered in the books as aforesaid shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates.

Sect. 4. enacts, that there shall be paid to the clerk of the judgments by the plaintiff, in every judgment upon verdicts, &c. by him respectively to be entered, the sum of 4d.

.1884.

affirmed
by the
court.

(page), and he is entitled to the rents. The object of the legislative manifestly was, that any person might, by searching the books in the office, learn from them what judgments there were affecting the lands of a given individual. Now all that could be learnt by searching the books here, would be, that there had been an issue joined in a particular cause. The party seeking to ascertain whether there was any judgment, would have to make further inquiry of the attorney in the cause. The Court of Exchequer have decided, that this judgment was not properly docketed, so as to give the judgment creditor a preference over a mortgagee whose title descended after the judgment. *Braithwaite and Another v. Assignees of Parnell* (a). The object of the present application is to place the judgment creditor in the same situation he would have been in if his judgment had been duly docketed in May 1828, and thus give his debt precedence over that of the mortgagee. The Court has no power to grant the application. The statute requires all judgments to be docketed in the term next succeeding that in which the judgments are entered. The effect of now docketing the judgment as of May 1828, would be to make it operate as a specialty debt from that time, whereas the statute puts a judgment not docketed on a level with a simple contract debt. *Flakey v. Hayter* (b); *Steele v. Rowe* (c). The effect, therefore, of granting this application, would be to contravene the statute. The plaintiff is not without remedy; he may have an action against his own attorney if he has neglected to docket the judgment according to the usual practice, or he may have an

(a) 2 T. 797. 233. 2 Cro. & J. 518.

(b) 6 T. R. 584.

(c) 1 B. & P. 307.; and see *Hall v. Tappin*; 5 B. & Ald. 355.

1884.

How wide
against
Wicks.

action against the chief clerk. In *Douglas v. Mallow* (a), Hilary term, 1769, a neglect of entering judgment, and a loss of the roll having been sufficiently shown to the Court, a rule was made, that the clerk of the judgments should sign a new roll, whereon was to be entered the judgment signed in that cause, in Michaelmas term 1729, and that the same should be numbered, ss. roll 256, and filed amongst the rolls of that term; a special entry being first made expressing the day of docketing the same; and it was further ordered, that that judgment should not be made use of against the administrator of the defendant Lord Mansfield there intimated, "that it very much concerned the chief clerk to take care, that the judgments be actually entered upon the roll in due time, and docketed; for that after he had received his fees for making such entry, he would be liable to an action upon the assumpsit brought by a purchaser, who should have become liable to it, and had searched the roll without finding it entered up. And he said, that the attorney who had undertaken to do this, and neglected it, would be liable, indeed, to the chief clerk, but still the chief clerk would be liable to the purchaser who had suffered by this neglect." (*Dagman C. J.*) "He would never be in jeopardy, if the Court could always see the mistake right." [The courts, when they have amended judgments, have taken great care not to affect the rights of mortgagees. In *Baker v. Baker* (b), where leave was given to enter up judgment of a preceding term, this Court, in order that it might not affect purchasers and mortgagees, ordered it to be docketed of the term in which the application

(a) 2 Burr. 522. (b) Tidd's Pr. 9th edit. 330.

1894.

—
 HORWOOD
 against
 WATTS.

was made. In *Sale v. Crompton*, per nomen *Compton* (a), this Court refused to amend the entry of a judgment by nil dicit, on a warrant of attorney (the defendant's name being entered as *Compton*, instead of *Crompton*), because *Crompton* might have other estates, and, for any thing that appeared, there might be purchasers not before the Court, who might be affected if the alteration was made. In *Evans v. Thomas* (b), the roll of the judgment had been carried in in *Trinity* term 1720, and docketed, but was mislaid and lost before it was filed. The Court, on motion, the defendant being dead, and the executrix consenting, ordered that a new roll should be filed, for, *there being a docket*, there could be no deceit on purchasers. It will be said here, that it was the duty of the officer of the Court to docket the judgment as soon as the note of it in writing was brought to him by the clerk of the judgments; and that his omission to do so was a misprision, and, therefore, that it may be amended. But it was incumbent on the plaintiff's attorney to instruct the clerk of the doggets to make the entry, and to pay him a fee of 4*d.* for so doing. There has been no misprision of the clerk; for he has docketed the issue as he was instructed, but not the judgment, because he was never required to do it.

Follett and Sewell contra. This case is one of very great importance, because all judgments in the Court of King's Bench, for the last hundred years, stand in the same situation as the present. In *Brailhwaite and Another, Assignees v. Watts* (c), the Court of Exchequer certainly held, that the docketing of the issue without

(a) 1 *Wils.* 61.(b) 2 *Str.* 833.(c) 2 *Tyrwh.* 293., 2 *Cro. & J.* 318.

docketing

docketing the judgment, and the debt, damages, and costs thereby recovered, did not satisfy the stat. 4 & 5 *W. & M.* c. 20. That statute requires the clerk of the judgments, within ten days before the end of the term next succeeding that in which the judgment shall be entered up, to bring to the clerk of the doggets a note in writing of the judgments, to the end that the same may be respectively entered in the doggets. If either the clerk of the judgments neglected to bring to the clerk of the judgments a note of the judgment in this case, or the latter, when it was brought to him, neglected to enter the particulars in the dogget, the omission in either case was a misprision of the officer of the court, and therefore amendable: *Com. Dig. Amendment, D., Braswell v. Jeco* (a), *Perkins v. Petit* (b), *Burroughs v. Stevens* (judgment of *Heath J.*) (c), and *Chapman v. Gale* (d), shew the power of the Courts in this respect, and the principles on which it is exercised. In *Davies v. The Earl of Strathmore* (e), Lord *Eldon* said, "Suppose the officer of the court refused to docket the judgment, and the creditor, being entitled to have it docketed, applied to the Court; the Court would order the clerk to enter the docket *as at the time when it ought to have been done.*" The practice which has prevailed for a hundred years has been followed in this instance. [*Taunton J.* I doubt the universality of that practice; it is contrary to the statute, which requires the officer of the Court to make into an alphabetical dogget the particulars, not of all issues, but of all judgments; and requires that to be done in the term after the judgment is signed. Here the judgment

1834.

HORWOOD
against
WATTS.

(a) 9 *East*, 316.(b) 2 *Bos. & P.* 275.(c) 5 *Taunt.* 557.(d) 2 *I. & J.* 22.(e) 16 *Ves.* 427.

1834.

1834.

Horwood

Against

Watts.

was signed in *May* 1828, and final judgment entered on the roll on the 9th of *December* 1828, but never docketed.

What authority have we now, in 1834, to order the judgment to be docketed as of *May* 1828?]

The omission to docket the judgment in the proper term being a misprision of the clerk, it is in the discretion of the

Court to order the entry to be now made as of the time when it was the duty of the officer to make it.

The defect did not arise from the fault of the attorney:

there is no book kept in the King's Bench office for docketing judgments, though there is one for docketing

issues. If the attorney entered the damages and costs in that book, it would not be docketing the judgment,

and he can do no more. [Taiton II. According to

the note to *Douglass v. Yule* (d), the modern practice

seems to be for the plaintiff's attorney to make the

entry upon the roll.] But he then acts as the clerk in

the chief clerk. The making of the entry must be the

act of the clerk, for the statute requires him to make

it. [Littledale J. It does not appear by the words of

the statute, how the chief clerk can be answerable as

there stated, when the statute throws the burden of

making the entry on another officer: but the clerk of the

judgments and clerk of the dockets are now the same

person.] The case in *Burrow* is very loosely reported.

It is clear, however, from *Burroughs v. Stevens* (d), that

whatever the statute requires to be done is the act of the

clerk and not that of the parties, and it would be hard if

the party here were to lose the benefit of his judgment

by an act of the officer of the Court.

(s) 2 Barr. 123.

(s) 5 Taiton. 1871.

DENMAN

DENMAN C.J. We will speak to the other Judges on this subject before we give our judgment.

Cur. adv. vult.

1834.

Herwood
against
Waters.

DENMAN now delivered the judgment of the Court.

We have considered this case, and are of opinion that we have no power to alter the docket in the manner proposed. The rule must, therefore, be discharged.

Rule discharged.

Dogden v. MARRIOTT, against EDWARDS and

Others.

EJECTMENT for messuages, &c. At the trial

before Parke J. at the sittings in *Middlesex* in this term, it appeared that the lessor of the plaintiff proceeded for a forfeiture incurred by nonpayment of rent, and other breaches of covenants in a lease. The lessor had mortgaged the premises, and afterwards (*December 6th, 1831*) granted the lease to one *Greenacre*, who became bankrupt, and whose assignees the defendants were. After granting the lease, he executed a second mortgage (*February 17th, 1832*), reciting the first, and assigning to the second mortgagee all his right, interest, &c. in the premises, both at law and in equity. It did not appear that the defendant had paid any rent since this mortgage. The learned Judge, upon proof of these facts, was of opinion that the lessor of the plaintiff could not maintain the action, the legal estate being no longer in him; and he directed a nonsuit.

In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage; although it be not shewn that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant.

Gale,

8501

1834.

J. J. J.

Horwood

J. J. J.

J. J. J.

J. J. J.

was signed in *May* 1828, and final judgment entered on the roll on the 9th of *December* 1828, but never docketed.

What authority have we now, in 1834, to order the judgment to be docketed as of *May* 1828?]

The omission to docket the judgment in the proper term being a misprision of the clerk, it is in the discretion of the

Court to order the entry to be now made as of the time when it was the duty of the officer to make it.

The defect did not arise from the fault of the attorney :

there is no book kept in the King's Bench office for docketing judgments, though there is one for docketing

issues. If the attorney entered the damages and costs in that book, it would not be docketing the judgment,

and he can do no more. [*Taiton* J. According to

the note to *Douglass v. Fuller* (d), the modern practice

seems to be for the plaintiff's attorney to make the

entry upon the roll.] But he then acts as the clerk, and

the chief clerk. The making of the entry must be the

act of the clerk, for the statute requires him to make

it. [*Littledale* J. It does not appear by the words of

the statute, how the chief clerk can be answerable as

there stated, when the statute throws the burden of

making the entry on another officer : but the clerk of the

judgments and clerk of the dockets are now the same

person.] The case in *Burrow* is very loosely reported.

It is clear, however, from *Burroughs v. Stevens* (d), that

whatever the statute requires to be done is the act of the

clerk and not that of the parties, and it would be hard if

the party here were to lose the benefit of his judgment

by an act of the officer of the Court.

(a) 2 Burr. 723.

(b) 5 Term. 457.

DENMAN

DENMAN C.J. We will speak to the other Judges on this subject before we give our judgment.

Cur. adv. vult.

1834.

Herwood
against
Watts.

DENMAN now delivered the judgment of the Court.

We have considered this case, and are of opinion that we have no power to alter the docket in the manner proposed. The rule must, therefore, be discharged.

Rule discharged.

Dogland v. Mannors, against Edwards and

Others.

EJECTMENT for messuages, &c. At the trial

before Parke J. at the sittings in *Middlesex* in this term, it appeared that the lessor of the plaintiff proceeded for a forfeiture incurred by nonpayment of rent, and other breaches of covenants in a lease. The lessor had mortgaged the premises, and afterwards (*December 6th, 1831*) granted the lease to one *Greenacre*, who became bankrupt, and whose assignees the defendants were. After granting the lease, he executed a second mortgage (*February 17th, 1832*), reciting the first, and assigning to the second mortgagee all his right, interest, &c. in the premises, both at law and in equity. It did not appear that the defendant had paid any rent since this mortgage. The learned Judge, upon proof of these facts, was of opinion that the lessor of the plaintiff could not maintain the action, the legal estate being no longer in him; and he directed a nonsuit.

In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage; although it be not shewn that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant.

Gale,

1834.

Doc dem.
MARRSOT
against
EDWARDS.

mortgaged the premises, and then, on the 6th of *December* 1831, granted the lease. He then, on the 17th of *February* 1832, executed a second mortgage, reciting the first, and assigning to the second mortgagee all his right, interest, &c. in the premises, both at law and in equity. We agree with my brother *Parke*, that he cannot, after this, recover for a forfeiture.

Rule refused.

Tuesday,
Jan. 28th.

TAYLOR against HELPS.

In a cause decided by the judge of an inferior court on a writ of trial, this Court will hear a motion for a new trial on the ground that the verdict was against evidence, though the damages were below 20l.

THIS was a cause tried before the undersheriff of *Middlesex*, upon a writ of trial, pursuant to stat. 3 & 4 W. 4. c. 42. s. 17. The plaintiff obtained a verdict for 11l.

Petersdorff now moved for a rule to shew cause why there should not be a new trial, on the ground that the verdict was against evidence; but the sum recovered being so small, he expressed a doubt whether the Court would listen to the application; the practice being not to receive motions for new trial on such grounds, in causes tried before judges of the superior courts, where the damages are below 20l.

DENMAN C. J. This being a cause tried before the sheriff, we are disposed to extend the rule of practice, on account of the smallness of the costs of trial in that court. The rule is not necessarily insisted upon in any case.

The motion was then gone into, but upon the merits the rule was

Refused.

1834.

— 4281

KINDER, against BANISTER, GUNNER, HUMPHREY, and BASSETT, and CHAPMAN.

A SSUMPSIT for goods sold and delivered, monies lent, monies paid, monies had and received, and on an account stated. Plea non assumpsit. Particular of demand. "To goods supplied, and money paid by the plaintiff for and on account of the defendants as churchwardens and overseers of the poor of the parish of *Hever* in the county of *Kent*, from *Easter 1826 to Easter 1827*,

the bills containing the full particulars thereof having been delivered: — 115*l*. 5*s*. 8*d*." At the trial before *Tindal* C. J. at the Spring assizes for *Kent*, 1833, the facts appeared to be as follows: In 1826—1827, *Banister* and *Gunner* were churchwardens, and *Humphrey* and *Bassett*

overseers for that year. *Chapman* was vestry-clerk and permanent assistant overseer. His appointment to the latter office was not produced. The plaintiff was a shopkeeper at *Hever*, who had, before the year 1826—1827, been accustomed to supply goods, on the account of the parish officers, for the poor. During that year, the parish officers, when assembled in vestry for the relief of the poor, used to give to the paupers who applied orders upon the plaintiff (which he complied with), for articles

of food and clothing, and also for money to pay their or overseer. All used to attend the board, though not all at the same time, and when called upon there to pay the shopkeeper for his goods and advances, had promised to do so when they could.

Held, that the shopkeeper, after the expiration of the year, might recover against all the parties both for the goods and the advances of money, if a jury were of opinion that they had all contracted with the plaintiff. And

That it was not necessary to shew by the appointment of the assistant overseer that he was authorized so to contract, the jury being satisfied that he had in fact bound himself to the plaintiff in respect of the goods and money supplied.

1834.

KIRBY
against
BANISTER.

monthly allowances. Some of these orders were signed by *Chapman*, who occasionally added to his name the word "clerk" or "overseer;" others were signed by *Banister*, and by *Bassett*; none by the other two defendants; but they all used to attend the board. The plaintiff's son had several times gone to the vestry meetings to demand money on his father's account, and had, on different occasions, seen all the defendants there, though not all at once; and they had, at those times respectively promised the witness to pay his father as soon as they could. Upon this evidence it was objected—First, that *Chapman* had acted only as assistant overseer, and must therefore be considered merely as the servant of the other officers in giving the orders in question, at least in the absence of any proof that his appointment was of such a nature as to allow of his issuing such orders on his own authority; and consequently, that he ought not to have been joined with the other defendants: Secondly, that it was against the duty of parish officers to borrow money for parochial purposes, and therefore the defendants who had not given the orders were not liable for the money so obtained; and *Massey v. Knowles* (a) was cited. The Lord Chief Justice was of opinion as to the first point, that *Chapman* had contracted jointly with the other parties, and was therefore liable; and on the second, that the advances had been recognised by all the defendants, and therefore all might be sued; but he reserved leave to move to enter a nonsuit on the first point. The plaintiff had a verdict for 115*l*. In the ensuing term a rule nisi was obtained for

(a) 3 Stark. N. P. C. 65.

entering a nonsuit, and also for reducing the damages by the amount of the money advanced.

1834.

—
 Kiss
 against
 BARNARD.

Andrews Serjt. now shewed cause. As to the first objection; the acts proved against *Chapman* are sufficient to make him a joint contractor with the other defendants. He was visibly a contractor as well as the rest; he was with them when the business was transacted, and joined with them in issuing orders and obtaining credit; and the credit must be supposed to have been given to him as well as to the others. Those who did not sign the orders acted in the same manner as the rest. By the stat. 59 G. 3., c. 12., s. 7., the inhabitants of any parish, in vestry assembled, are enabled to nominate an assistant overseer, and to determine and specify the duties to be performed by him; two justices are empowered to appoint him accordingly, by warrant, for such purposes as shall have been fixed by the vestry; and he is, by that clause, empowered "to execute all such of the duties of the office of overseer of the poor, as shall in the warrant for his appointment be expressed," in like manner as the same may be executed by any ordinary overseer. If the appointment be not produced, it must be presumed under such circumstances as were proved in this case, that the party acted under the authority given by his warrant of appointment, and in the character of assistant overseer, not of servant to the parish officers. He suffered the plaintiff to deal with him on that understanding. As far, indeed, as the evidence goes (no appointment being produced), he may not even have been assistant overseer; but whether he was so or not, the credit given him in consequence of his own conduct,

1834.

KIRBY
against
BANISTER.

renders him liable. As to the second point, the advances of money stand on the same footing as the other debts; there is no authority for saying that parish officers may not obtain such advances for the present exigencies of the poor, if the rates cannot be immediately got in. In *Massey v. Knowles* (a) the money seems to have been lent to a single overseer, as such, but on his individual credit, and the action was brought against all; here all the officers acted indiscriminately in incurring the debts, and all acknowledged them, and promised to pay as soon as they were able.

Thesiger, contra. As to the first point; the particular charges all the defendants as churchwardens and overseers: the question then is, whether they have all acted in that character. As to two of them, who signed no order, the case must entirely rest upon the character they bore. *Chapman* is said to have been assistant overseer; but, to know what are the responsibilities of that office, reference must be had to the statute, and that shews that the duties and liabilities of the office are to be defined by the warrant of appointment. To fix a liability in any particular respect upon the defendant *Chapman*, the warrant ought to have been produced. *Bennett v. Edwards* (b). The case here would have been strong, if that had been done, and the warrant had shewn that the duty of relieving the poor was imposed on *Chapman*. But that is not to be inferred in the absence of the warrant; and no notice was given to produce it. [*Patteson J.* The acts of *Chapman* are relied upon as ground of liability.] He acted as a mere

(a) 3 Stark. N. P. C. 65.

(b) 7 B. & C. 586.

servant,

servant, and the plaintiff must have known it. Before the stat. 59 G. 3. c. 12., it was understood that an assistant overseer acted only as a servant, and it is so now, unless the contrary appear by his appointment. [Taunton J. A person appointed assistant overseer need not have a circumscribed authority. Denman C. J. He may have a greater, or at least a more immediate control, than the other officers.] It was necessary here to shew that all the officers were liable; and to do so, it should have been proved that they concurred in contracting the debt. It has never yet been determined that, independently of such contract, one overseer is bound by another's act. *Malkin v. Vickerstaff*(a), and the judgment of Parke J. in *Rex v. The Justices of Gloucestershire* (b), rather shew the contrary. Here no evidence appeared, as to two of the defendants, that they had given any orders. [Patteson J. Was not this part of the case matter to be determined by the Jury? In *Malkin v. Vickerstaff*(a), one overseer (the defendant) was not proved to have had any knowledge of the relief ordered by the other, or to have assented to it afterwards, and yet it was considered to have been a question for the Jury, whether credit was given to one or both.] As to the second point; the parish officers have no power to borrow money for the relief of the poor; *Massey v. Knowles* (c), *Leigh v. Taylor* (d); their duty is limited to the application of the poor-rate. [Denman C. J. If an overseer asks a person to pay money for him, and says, "I will repay you on Monday;" is not he liable?] Personally, but not as overseer. [Littledale J. This was not exactly a borrow-

1834.

 KIRBY
 against
 BANISTER.

(a) 3 B. & A. 89.

(b) 1 B. & Ad. 5.

(c) 3 Stark. N. P. C. 65.

(d) 7 B. & C. 491.

1884.

 KIRBY
 against
 BANISTER.

ing of money.] It was the same thing. In *Tawney's case* (a) it is laid down that an overseer is not bound to lay out money till he has it; it cannot, therefore, be necessary that he should borrow. [*Taunton J.* This was not money borrowed *in solido*: the paupers went to the plaintiff's shop, and sometimes had their monthly payments advanced. We must be cautious how we limit the responsibility of overseers on this point. The consequence might be, that the poor would starve. *Littledale J.* It would throw great difficulties in the way of the management of the poor in many parishes.]

DENMAN C. J. It was one point for consideration in this case, whether the Lord Chief Justice ought not to have expressly left it to the jury to say whether the defendants jointly contracted with the plaintiff or not; but I think that which was equivalent was done; and it appears to me that there was strong evidence of a joint contract. It is clear that all these parties were competent to render themselves jointly liable, if they acted so as to make the plaintiff look to them for payment; and I think it was proved that they did so act. The defendant *Chapman* signed several orders, sometimes adding the word "clerk" or "overseer;" others of the defendants signed other orders; and *Chapman* was present as well as the others on several occasions when money was demanded on behalf of the plaintiff, and made promises to pay. It is true that, in his particular, the plaintiff charges all the defendants as "churchwardens and overseers," but that does not import any legal definition of the character they filled; and it is not even clear that the plaintiff knew *Chapman* to be

(a) 2 *Salk.* 551. 2 *Ld. Raym.* 1009, *S. C.* more fully.

only

only an assistant overseer. I think, however, that as to him, nothing depends on the strict legal character in which he acted; if, indeed, he had said, "I act only as servant or assistant to the overseers," that would have been a warning to the creditor not to consider him as one of the parties contracting; but that was not done. I think the jury were right in the verdict they found. The cases which have been cited do not apply. In *Leigh v. Taylor (a)*, the defendant was bound as surety that an overseer should account for all sums which should come to his hands by virtue of his office; and the surety was held not to be liable for the repayment of a sum advanced to the overseer by way of loan, and applied by him to parochial purposes. That is very different from the question whether or not a creditor may look personally to an overseer who has obtained goods from him under circumstances like the present; and I think no difference ought to be made as to the advances of money in this case; a slight accommodation in money rendered as this was, may be considered in the same light as the supply of goods.

LITLEDALE J. It is not necessary that the assistant overseer should be shewn to have had a particular authority as such, if he has made himself personally liable. A tradesman is not bound to look to the legal character which the party holds, if such party has put him in a situation in which the tradesman may be authorised to consider him as his debtor: and I think that was so in the present case, though the defendant *Chapman* sometimes signed himself "overseer," sometimes "clerk,"

1894.

 KIRBY
 against
 BARNISTER.

(a) 7 B. & C. 491.

1884

KIRBY
against
BANISTER.

and though the orders were given sometimes by one officer and sometimes by another. It was a joint concern among the parties. As to the money advanced, it would be extraordinary if overseers, instead of suffering the paupers to come to their houses, sent them to a shop to receive their weekly or monthly payments, and it was then held that the shopkeeper could not recover against the overseers for the money paid on those occasions, as well as for goods supplied. The rule must be discharged.

TATNOR J. concurred.

B. PATTERSON J. It was necessary to the plaintiffs case that all the defendants should have rendered themselves liable; but upon this subject the jury were sufficiently directed, and gave their opinion. It was not requisite that all five should have been present when each order was given; or should have actually made a promise respecting such order. If it were so, there would be great inconvenience where five parish officers were concerned, and it might even be arranged so that the whole five should never interfere on any occasion. It was for the jury to say to whom credit was given. It has been made a question as to *Chapman*, whether his authority, as assistant overseer, was not so limited that he could not bind himself. But if he promised the plaintiff to pay, we are not to assume that he was restricted by his appointment from so engaging. He might have authority to do so, and we are not to take it for granted that he had not.

Rule discharged.

1834

Ex parte PITT.

MR. CHARLES PITT in this term (January 14th) moved in person for a rule, calling upon an attorney of this court to answer certain matters alleged against him on affidavit.

A motion calling upon an attorney to answer matters alleged against him on affidavit must be made by a barrister.

DENMAN C. J. We think that we cannot hear an application calling upon an attorney to answer matters seriously affecting his character, unless such application be made by a gentleman of the bar. It is like a motion for a criminal information; we ought to have the opinion of a barrister that there is ground for the proceeding. There was, indeed, a rule lately granted on the motion of the present party in person, by which attorneys were called upon to answer the matters of an affidavit; but the application for that purpose was appended to another, by which the party claimed the protection of the Court in certain proceedings against him; as to which there appeared to be ground for calling upon the attorneys to make a statement, and, therefore, the rule was granted in its whole extent. The present is a different case.

LITLEDAL J. In the principal matter depending in that case (a), much turned upon the question whether a certain document originally bore date of the 7th or 8th of June; and I granted Mr. Pitt a rule calling on

(a) *Pitt v. Coomes*:

1834.

Ex parte
Pitt.

the attornies to answer as to that, and also as to the matters alleged against them in his affidavits, both being intimately connected; but perhaps it was wrong to do so. The present rule cannot be granted.

TAUNTON and PATTESON Js. concurred.

Rule refused.

Tuesday,
Jan. 28th.

PITT against COOMES.

A person having made a motion in a cause to which he was party, left the court, and, in his way home, called at an office where he kept his papers but did not reside, to refresh himself and sort his papers: he remained there between one and two hours, and then left the office, and went into a tailor's shop in the same street, intending, however, to proceed home immediately, and being on his way thither when he so deviated. As soon as he entered the shop he was arrested by a sheriff's officer, who had watched him from the court.

THE plaintiff applied (*January 27th*) to be discharged out of the custody of the sheriff of *Middlesex*, upon affidavits which stated the following circumstances:—The plaintiff lived at a place called *The Polygon* in the parish of *St. Pancras*, and had an office in *Adam Street, Adelphi*, where he kept his papers of business. On the 22d of *January* he called at his office for some papers, and proceeded thence to the Court of King's Bench, where, in the evening of the same day, he obtained a rule absolute in the cause, *Pitt v. Coomes*. He then left the court, with a person named *King*, who had accompanied him, and proceeded directly to his office, where he sorted his papers, and he and *King* took some refreshment, having had none during the day. It was near six in the evening when they arrived at the office, and before seven the plaintiff left it in company with *King*, when an officer of the sheriff of *Middlesex*, about seven o'clock, arrested the plaintiff on an attachment issued in a cause in chancery, *Pitt v. Tokelove*. The plaintiff was at this time going home to *The Polygon*, intending only to call

Held, that the privilege of the party, redeundo from the court, had not ceased when he was arrested, and that he was entitled to be discharged.

at

at the Rule office, *Symond's Inn* (which lay in his way), for the purpose of drawing up his rule.

1834.

 Pitt
against
Coombe.

The Court granted a rule to shew cause. The affidavits in answer to the rule (sworn by the sheriff's officer and others) stated that the officer had seen the plaintiff in court, and watched him from thence to his office; that he entered the office about twenty minutes after five, and remained there till a little after seven, when he came out and went into a tailor's shop in the same street, near the office, and the sheriff's officer also entered the shop and there arrested him.

Dampier now shewed cause. The plaintiff was no longer privileged at the time of the arrest. He had gone from the Court to his office, remained there nearly two hours, and then proceeded, not to his home, but to a tradesman's shop. [*Denman C. J.* mentioned the case of *Lightfoot v. Cameron (a)*.] There it is merely stated that the party, after leaving the Court, went to a tavern to take refreshment, and was arrested while doing so. Here the plaintiff after refreshing himself, left his office, and instead of going directly home, deviated, and, upon that deviation, was arrested. The moment he went out of his way, the protection *redeundo* ceased; it is immaterial whether the deviation lasted a minute or an hour.

DENMAN C. J. The doctrine of deviation might become very alarming if carried to such an extent, that whenever the officer saw the party going one yard out of his way home, he might immediately arrest him.

(a) 2 W. Bla. 1113.

1834.

PITT
against
COOMES.

The officer should not dodge too closely. A party on his return from a court of justice ought substantially to receive its protection, and to have the benefit of its dignity and quiet, till he reaches his home. The case just cited was stronger than this. There the party was dining with his attorney and witnesses when the officer took him; and yet he was held to be protected.

LITTLEDALE J. There is a case (a) where a woman was witness on a trial at *Winchester*, which ended at four in the afternoon of *Friday*; she stayed there till *Saturday*, and at seven in the evening was arrested as she was going home to *Portsmouth*; and this Court held that she ought to be discharged. The rule must be absolute.

TAUNTON and PATTESON J_s. concurred.

Rule absolute. (b)

(a) *Hatch v. Blisset* (13 Ann.), *Gilb. Cas. K. B.* 308., cited in 2 *Str.* 986. and 6 *Bac. Ab.* 531. 538., 7th ed. See, however, the dictum of Lord *Ellenborough* in an *Anonymous* case, 1 *Smith's Rep.* 355.

(b) See *Rishton v. Nisbett*, 1 *Moody & Rob.* 347.

1834.

The KING *against* GRANT and Others.Tuesday,
Jan. 30th.

CRIMINAL information for a libel. The information stated that, before the committing of the offences, &c. a commission had issued against the defendant, *Patrick Grant*, and assignees had been appointed; that before the issuing of such commission, *Grant* had been a co-proprietor of a newspaper with one *Young*, and that "certain transactions had taken place since the said bankruptcy respecting the sale by the assignees of the said *Patrick Grant* of his interest in the said newspaper." The information then charged, that the defendants contriving, &c. to defame the solicitor to the commission, and one of the assignees, and to cause it to be believed that they had been guilty of fraud and breach of trust in the execution of their respective duties in relation to the said commission, &c. published of and concerning the said commission of bankrupt, and of and concerning the said assignee and solicitor under the said commission, "and the said transactions as aforesaid," a certain false, &c. libel, containing the false, &c. matters of and concerning the said assignee and solicitor respectively following, that is to say. The libel was then set out. It contained several injurious statements of the conduct of the prosecutors in transactions relative to *Grant's* bankruptcy, and accused them of "fraud and falsehood," and of "swindling," in the discharge of it to have had in view, and the Judge is informed that the evidence is offered for that purpose, it is admissible.

Affidavits are not receivable to shew that a Judge is mistaken in his report of a cause tried before him.

Where an information for libel states that certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and the prosecutor, at the trial, gives general proof of such transactions, to support the introductory part of his pleading, the defendant is not thereby authorized to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel.

But if such evidence be adduced, *bonâ fide*, to shew that the transactions referred to in the alleged libel are not the same with those which the information supposes

their

1894.

The KING
against
GRANT.

their respective functions; stating, among other things, that, in order to defraud the creditors, they had made a false assertion respecting a purchase of the newspaper by *Young*: that, by such false assertion, *Young* had been enabled to maintain a Chancery suit against the creditors; and that, at a late meeting of the creditors, it had appeared that *Young* withdrew the allegation of his having made such purchase. At the trial before *Denman* C. J., at the sittings in *Middlesex* after last *Michaelmas* term, the solicitor and assignee were called as witnesses for the prosecution, and, in their examination in chief, gave general evidence of the facts stated in the inducement; and, in particular, that transactions had taken place after the bankruptcy, relating to the sale by *Grant's* assignees of his interest in the newspaper. *Kelly*, for the defendants, endeavoured, in cross-examination, to go into the particulars of the several transactions respecting the sale of *Grant's* interest in the paper. The Lord Chief Justice, considering this an attempt to bring into question the truth or falsehood of the libel, refused to allow such questions to be put. The defendants were found guilty. In this term (*January* 15th),

Kelly moved for a rule to shew cause why a new trial should not be had, on account of the above-stated rejection of evidence. The objection to these questions was, that by asking them, the truth of the libel might incidentally be brought in question. But if certain transactions are averred in the introductory part of the information, and the averment as to them is a material one, evidence must be gone into respecting them. The Lord Chief Justice thought that evidence might be
given

given to shew generally that such transactions had happened, but not what the nature of them was; but it was necessary to go into the particulars, in order that the jury might judge whether a true character had been given of the supposed libel in the introductory averments. They are to decide on the whole matter, and an essential part of it is, not only whether the transactions referred to had happened, but whether they were of such a nature as the information suggests, and whether the publication complained of was a libel with relation to them. The jury could not judge of that without the evidence which it was proposed to go into. Lord *Mansfield* said in *Rex v. Horne* (a): "The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written." Here the gist of the charge was the transactions relating to the sale of the newspaper. In *Rex v. Horne* (b), where the information stated the libel to be "of and concerning his Majesty's government and the employment of his troops;" but no particular statement was made as to the occasion on which the troops had been employed, and to which the libel referred, the defendant proposed to give in evidence an affidavit, published before the libel, relating to the employment and conduct of the king's troops in an encounter with the insurgents in *America*. Lord *Mansfield* said (in delivering the judgment of the Court), "I told the defendant, if he meant to prove the facts to be true as above, it could not be done by affidavit, the person himself being present, and even if he was absent, they could not be proved by affidavit;

1834.

The King
against
GRANT.

(a) *Cowp.* 679.(b) *Cowp.* 672.

but

1834.

The King
against
Graham

but if he meant to shew that at the time there existed a public account in the newspapers, which might be of use to restrain or qualify the meaning of the paper in question upon the information, he might do so." Upon the same principle the evidence was admissible here, to shew what transactions the writing in question referred to, and whether, taken with reference to them, it was libellous. If an indictment charged that a bankrupt had passed his examination, and that a libel had been published concerning it, stating that the bankrupt had, on such examination, sworn contradictory matters, and thereby committed perjury; it cannot be said that the particulars of the examination itself might not be gone into, it being incorporated with the libel by the introductory averment. In the present case it is stated as part of the libel, that the solicitor and assignee are alleged to have made a false allegation respecting the sale of the newspaper, to defraud the creditors; this is one of the transactions of and concerning which the libel is said to have been published: how can the Jury say that the publication is a libel respecting, and applicable to, a transaction so described, unless they know particularly what the transaction was? [*Denman C. J.* The falsehood imputed in that transaction was not in itself insisted upon: the ground of complaint was the foul and calumnious language that ran through the whole publication. In the part in question, it was not merely said that a false statement was made on a particular subject, but that it was made to defraud the creditors.] The prosecutors might have relied upon the general abuse merely; but they have, by their introductory averments, incorporated particular transactions with the subject matter of the charge; and if their case be such

as to require proof of matters which may bring the truth or falsehood of the libel into question, the defendant is not therefore to be precluded from examining into the matters so introduced.

1821
1834.

THE KEY
against
GRANT.

DENMAN C. J. Undoubtedly the defendants in pleading to this information, put in issue all the material allegations contained in it; I admit without reserve, that it was in issue whether or not the alleged libellous matter related to the transactions mentioned in the introductory averments of the information. And if counsel for the defendant, in a case like this, were to say, *bonâ fide*, "I propose entering upon this evidence to shew that what is stated in the information is not proved, for that the libel does not apply to the transaction referred to by the pleading; and in order to shew that, the evidence must be gone into;" it would then be admissible. But in this case it was taken for granted that the transactions had happened, and that the libel related to them; the object in offering this evidence was to shew that it related to them justly. It came then to the question, whether or not the truth of a libel can be put in issue on an information. I have always thought it could not. The reason now given for going into the evidence in question was not suggested, and the Judge who tries a cause ought to be informed of the purpose for which evidence is offered.

LITTLEDALE J. I entirely concur. If the evidence had been offered to prove that the libel did not relate to those transactions which the information applied it to, the enquiry might have been pursued; but not with any other view.

1834.

TAUNTON J. concurred.

The KING
against
GRANT.

PATTESON J. I am of the same opinion, for the reasons given by my lord, which I need not repeat.

Rule refused.

On this day, the defendants were brought up for judgment, and

Kelly renewed his former application, stating that on reference to another gentleman who was counsel in the cause, and to a short-hand writer's note, he found that the evidence had been offered at the trial, as bearing upon the question, whether or not the transactions referred to by the libel were the same as those mentioned in the introductory part of the information, and that, in particular, it had been asked, "how the jury could know that the transactions were the same, if such evidence were not gone into?" [*Denman* C. J. My note and my recollection are distinct on the subject. It might perhaps be said by way of argument, "how can the jury know that the transactions were the same, without this evidence?" but the object always was to introduce the truth of the statements in the libel. If the evidence had been, or could have been offered, *bonâ fide*, for the purpose now suggested, it would have been different. If counsel had told me that they really put the questions for the purpose of shewing that the libel did not relate to the transactions referred to in the information, I should have allowed them to be put, though I should have been surprised at the mode of proceeding. But when it was suggested that merely because certain transactions were spoken of in the introductory part of
the

the information, the defendant's counsel might go into the history of those transactions, I could not allow such a course to be taken.]

1834.

The KING
against
GRANT.

Kelly offered to put in the short-hand writer's notes, and affidavits of the circumstances under which the evidence was offered.

DENMAN C. J. I will not hear affidavits as to what passed at the trial, unless the Court tell me that I ought.

LITTLEDALE J. The affidavits cannot be received.

TAUNTON J. The question is, whether the affidavits of by-standers are to be admitted, to prove that the Judge who presided at a trial is guilty of mistake as to what passed. If such affidavits were now received, it would be the first instance of such a practice, and would produce the greatest injury to the administration of justice (a).

(PATTESON J. was in the Bail Court.)

The defendants then received judgment.

(a) See *Everett v. Youells*, 4 B. & Ad. 683.

1834.

Friday,
Jan. 31st.

In the Matter of ———, Gent., One, &c., and
————, Gent., One Other, &c.

The Court of King's Bench will not grant a rule calling on an attorney to shew cause why he should not be struck off the roll, if the affidavits in support of the rule state an offence for which he would be liable to indictment.

SIR JOHN CAMPBELL, Solicitor-General, on a former day in this term, moved for a rule calling on two attorneys of this court to shew cause why they should not be struck off the roll, on affidavits charging them with professional misconduct in certain pecuniary transactions. [*Denman* C. J. The facts stated amount to an indictable offence. Is not it more satisfactory that the case should go to a trial? I have known applications of this kind after conviction, upon charges involving professional misconduct; but we should be cautious of putting parties in a situation where, by answering, they might furnish a case against themselves, on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offence is charged. *Patteson* J. referred to *Short v. Pratt* (a).]

The Court, however, desired the Solicitor-General to see if any precedent could be found of such an application as the present having been granted. He now stated that he had been unable to find any, and the rule was

Discharged.

(a) 1 Bing. 102. See also *In re Knight and Hall*, 1 Bing. 142.

1834.

The KING *against* KIRKE and Three others.Friday,
Jan. 31st.

A MANDAMUS was moved for in a former term, calling on the defendants, aldermen of *East Retford*, to attend a corporate meeting of the bailiffs, aldermen, and burgesses of the said borough, for the purpose of electing an alderman in the room of one lately deceased. In *Michaelmas* term last counsel were heard on both sides, but no affidavit was put in for the defendants; the rule was made absolute, and a mandamus issued. The writ recited the duty of the aldermen under the charter, among other things, in electing new aldermen upon a vacancy, and it stated that certain meetings had been holden for that purpose, which the defendants had been required to attend, but that they had neglected and refused to do so, in consequence of which no election had taken place; and it then required them to attend a meeting, as above stated, as soon as the same could be called, and to do every act necessary in order to such election. It appeared by the affidavits in support of the present rule, that after the granting of this mandamus, and after service of it on the defendants, *Thomas Appleby* the senior, and *Robert Hudson*, the junior bailiff, according to the custom of the corporation, issued their precept to the serjeants at mace to summon a hall of the corporation, for the purpose of choosing an alderman to fill one of the vacancies referred to by the mandamus; and that the defendants were duly served with such summons. One of them attended the meeting; the others, although

Under stat. 1 W. 4. c. 21. s. 6., the costs of a mandamus, and of applying for it, may be obtained of the Court by a distinct motion, after the issuing of the writ.

And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties.

1834.

The King
against
KIRKE.

they did not attend, acquiesced in what was there done; and no further proceedings were taken on the mandamus. In this term a rule was obtained, calling on the defendants to shew cause why they should not pay the prosecutors their costs of, and occasioned by, the application lately made by them for a mandamus (as above), and also the costs of the present application. The affidavits in support of the rule stated the service of the writ of mandamus (which was set out at length), and the non-attendance of three of the defendants at the meeting holden in pursuance of the writ. The last-mentioned defendants made an affidavit in answer, setting out the grounds of their non-attendance at meetings previous to the motion for a mandamus, and stating that they had sent in their respective resignations of the office of alderman, but the rest of the corporation had refused to accept them, after which this mandamus was moved for; they then explained their apparent disobedience to that writ, and stated that they had subsequently acquiesced in the proceedings taken at the meeting which the writ required them to attend.

Sir *J. Campbell*, Solicitor-General, and *Hill*, now shewed cause. The act 1 W. 4. c. 21. s. 6. (a), under which this motion is made, will have an operation much to be regretted, if a practice is established of applying for costs of the application for a mandamus whenever

(a) 1 W. 4. c. 21. s. 6. "And for making some further provision for the payment of costs on applications for mandamus, be it further enacted, that in all cases of applications for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid."

the

the writ has been granted. The prosecutors ought to have their costs of the mandamus itself; but the costs of the application, if demandable, should have been moved for at the same time as the writ; the Court ought not to be called upon now to entertain a question which makes it necessary to open up the whole matter of the original motion. [*Littledale J.* Where a mandamus is granted, the prosecutor may, upon the return, have judgment given against him. Till the event is ascertained, the Court may not be able to decide upon the right to costs.] In some cases that might be a question; but the difficulty which might arise in those instances is no ground for a general rule. Here all the merits were before the Court in the first instance. The motion was only for a mandamus to corporators to attend a corporate meeting. No new facts were stated on shewing cause. The Court might safely have granted costs if they had been moved for in the rule for a mandamus. [*Taunton J.* I think that in one of the cases of mandamus to the *Hungerford Market Company* there was a distinct motion for costs, and the Court said they would wait till they saw the result of the mandamus. *Denman C. J.* It was the case *Ex parte Davies(a)*.] It may have been conceived

(a) Reported, but not as to this point, 4 *B. & Ad.* 327. The mandamus (to summon a jury to assess compensation) was granted in *Michaelmas* term 1832. The writ was obeyed, and an inquisition was held, *February* 20th, 1833. In *Easter* term 1833, *Kelly* obtained a rule to shew cause why the company should not pay *Elizabeth Davies* the costs of her late application for a mandamus, and also the costs of the said writ, and incidental thereto, and the costs of this application. The rule was enlarged. No return was made to the mandamus. In *Michaelmas* term 1833, *Follett* shewed cause against the rule, on the ground that the company might reasonably have thought themselves justified in resisting the claim to compensation, the question arising on a doubtful clause in the company's act. The Court made the rule absolute.

1834.

The King
against
KIRKE.

1834.

The King
against
Kilmer.

ceived in that case, that a good return might be made : here that could not be supposed. [*Taunton J.* If the rule were as you would state it, a party not moving for costs of the application for a mandamus in the first instance would be precluded from ever obtaining them.] It is the same in other cases where costs of an application are moved for. [*Taunton J.* That is where the principal matter and its incidents are one and inseparable. *Littledale J.* The practice introduced by this act, of applying for costs of the mandamus after the writ is disposed of, is in itself an anomalous one.] At least where the costs of the application can be moved for at the same time with those of the mandamus, it ought to be done : there is nothing in the act to prevent it, and the delay leads to expence and waste of time. No reason is shewn for it here. The affidavits which are before the Court when the mandamus is moved for, but not afterwards, may be very material to guide the discretion of the Court as to costs.

Sir *James Scarlett* and *Hildyard*, *contra*. We are entitled now to call in aid the affidavits on which the mandamus was obtained. And the mandamus itself, by its recital, gives sufficient information of the facts. It is true that, in moving for a mandamus, the costs of the application might be included, but then the party must run the risk of paying costs if the rule is refused. And a rule may be granted, and the party against whom the

In *Rex v. The Hungerford Market Company (Ex parte Farlow*, 2 B. & Ad. 204. note (a), 348. note (a), a motion was made for costs of the mandamus and of applying for it, after the writ had been obeyed; the Court refused the costs, but the ground was, that the application for a mandamus was made before the act 1 W. 4. c. 21. came in force.

mandamus

mandamus goes may prove, on the return, to have been right: then the costs, if already granted, will have been paid by the party not in fault. It is better that there should not be a multiplicity of motions for costs, but that the whole question of costs should be settled at once, when the result of the mandamus appears. At least no rule has yet been laid down forbidding this practice. [Denman C. J. Does it appear that the parties making the present application are the same with those who complained of the default made by the Defendants at the former meetings?] The original affidavits must be read to shew that. [The Solicitor-General. They ought not to be read; the present rule does not call upon the defendants to answer them. Denman C. J. The Court think that they clearly may look at the former affidavits, and that they must do so to guide their judgment as to the costs. Patteson J. If the present had been an entirely separate motion, the case might have been different. But this is a rule which refers to a former proceeding between the parties in the same matter, and the affidavits which it is proposed to read are those sworn on that former occasion (a).]

DENMAN C. J. The Court think it right that the rule should be made absolute for the costs of the writ and original application, but not of this application (b).

LITTLE-

(a) The affidavits in support of the rule for a mandamus were sworn by Appleby and Pearson, the senior and junior bailiff above-mentioned, and by several other persons. They stated the subject-matter of the complaint as set out in the mandamus; and further, that the defendants had written letters tendering their resignations, respectively, of the office of alderman, and that two of them had stated their intention, by so doing, to break up the corporation.

(b) It may be presumed that the Court, in refusing the costs of the present

1834.

The King
against
Knap

1834.

LITLEDALE, TAUNTON, and PATTESON Js. concurred.

The KING
against
KIRKE.

Rule absolute as above (a).

present application, did not intend to fix a precedent for all cases in which a motion for costs should be made after the time of obtaining the mandamus. Two, at least, of the learned Judges appear to have inclined to the opinion, that the motion for costs might, in some cases, be properly deferred; and if, in any instance, a distinct application ought to be made, it would seem that the costs of such application should be grantable by the Court.

(a) In *Rex v. The Commissioners of the Harbour of Rye*, a rule was obtained, calling on the defendants to shew cause why they should not pay to *Samuel Miller*, Gent., his costs of several applications lately made by him for writs of mandamus directed to the defendants, for enforcing the settlement and payment of charges incurred by, and which had become due to him in enforcing and protecting the rights of the harbour of *Rye*, and for compelling the commissioners to raise funds on the security of the rates and tolls of the said harbour for the purpose of paying the said costs and charges, and also the costs of an application by the said *S. M.*, for an attachment against several of the defendants for their contempt in not returning the first of the said writs; and the costs of the present application. In *Easter* term 1833, (*May 7th*) *Follett* shewed cause. It appeared that the first mandamus having been granted in 1832, and no return made, a rule nisi was obtained for an attachment; after which the defendants returned that they had paid part of the charges, but had no money applicable to the rest. A rule nisi was afterwards obtained (*Mich. T. 1832*) for a mandamus to the commissioners to borrow (according to a local statute under which they acted), such sum of money as should be necessary to pay the remainder of the said charges. An arrangement being then come to between the parties on the principal points, the question now was as to the costs of the above-mentioned applications.

The Court, (*Littledale* and *Parke* Js.) as to the first mandamus, refused the costs, because the commissioners had made a good return; and as to the second, they were of opinion that the costs ought not to be given, considering that the application, as framed, for a mandamus to the commissioners to borrow money, was a strong measure, and might have led to their being called to account for complying. The rule was therefore discharged, but without costs to the commissioners.

1834.

BODFIELD and Another *against* PADMORE.Friday,
Jan. 31st.

A RULE was obtained this term, calling on the defendant to shew cause why an order of *Taunton J.* for discharging the defendant out of custody should not be set aside, and why the plaintiffs should not be at liberty to retake the defendant on the present or any other writ. The defendant having been arrested on a *capias* of this Court, issued in *November* last, a summons was obtained to shew cause before a judge at chambers, why the defendant should not be discharged on entering a common appearance. The parties attended before *Taunton J.*; and it was first urged that the *capias* was irregular, because the defendant was described in the body of the writ as *G. P.* "of the city of *London*," without any further addition, or more particular description of his residence. The learned Judge, however, thought the description as full a one as is required by the act for the uniformity of process, *2 W. 4. c. 39.* Secondly, it was objected that the *capias* was not indorsed with the Christian names of the plaintiffs' attornies, but only with the surnames, "*H. and B.*" Thirdly, it was objected that the affidavit of debt did not state that the plaintiffs were partners, but merely that the defendant was indebted to "*James B. and Joseph B.*" The learned Judge also overruled these objections. It was lastly suggested that there was no indorsement of the defendant's place of abode and addition, on the back of the *capias*,

The rule of Court, *Hil. T. 2 & 3 G. 4.* requiring that on all bailable meane process, the defendant's place of abode and addition shall be indorsed, is in effect repealed by stat. *2 W. 4. c. 39.*; and therefore the want of such indorsement is no objection to a *capias* issued under that statute. It is sufficient that in the body of such writ the defendant is described as "*G. P. of the city of London.*"

An affidavit to hold to bail for a debt stated therein to be due to *A. and B.*, is good, though the plaintiffs are partners, and are not stated to be so in the affidavit.

1834.

—
BODFIELD
against
PADMORE.

as required by the rule of Court, *Hil. 2 & 3 G. 4. (a)*; and the learned Judge, on this objection, ordered the defendant to be discharged, observing, that the late books of practice by Mr. *Tidd (b)* and Mr. *Chapman (c)* treated the rule in question as still subsisting.

Kelly now shewed cause. The rule of *Hil. T. 2 & 3 G. 4.* is not repealed by the act 2 *W. 4. c. 39.* That act, by sect. 1., requires the place and county of the defendant's residence to be mentioned in every writ of summons, and refers to a form, No. 1. in the schedule. Sect. 4., which treats of bailable process, does not repeat this direction, but it refers to a form, No. 4. in the schedule, and it is evident, on a comparison of the two sections and the forms referred to, that the same direction is meant to be observed in both cases, as to the description of the defendant (*d*). No intention is shewn in either clause to discontinue the former indorsement of the defendant's addition and place of abode; nor is that rendered unnecessary, for the particulars now to be mentioned in the body of the writ do not convey the same information. And the statement made as to the defendant in the present writ, is too general even to satisfy the terms of the late act. The affidavit to hold to bail was also defective, on the ground stated before the learned Judge at chambers.

R. V. Richards, contra. The act 2 *W. 4. c. 39.* virtually repeals the rule in question as to the indorsement on bailable process. By sect. 1., and the

(a) 5 *B. & A.* 560.

(b) See p. 1098., post.

(c) Second Addenda to *Chapman's King's Bench*, 1833, p. 63.

(d) But see *Bosler v. Levy*, 1 *Bing. N. C.* 362.

schedule No. 1. there referred to, the place and county of the defendant's residence are to be inserted in the body of the writ, in the case of non-bailable process, but even there, no indorsement of these particulars is required, either by the enacting clause or by the schedule; and in sect 4. and schedule No. 4., which relate to bailable process, no such indorsement as to the defendant is in any way directed or alluded to, although several indorsement are required, and it is particularly directed that one shall contain the name of the plaintiff's attorney (to be described as "*E. F. of,*" &c.), or the plaintiff's name and place of residence, if he sue in person. The indorsement required by the rule of *Hil. 2 & 3 G. 4.*, was for the benefit of the sheriff, not of the defendant, and is considered, in that light by the Court in *Clarke v. Palmer* (a). If that rule continued in force, it would be unnecessary to require the name and residence of the plaintiff's attorney to be indorsed. But the act expressly states, by the schedule, what indorsements shall be made on bailable process, and no others can be insisted upon.

1834.

 BODFIELD
 against
 PADMORE.

DENMAN C. J. The affidavit stating the defendant to have been indebted to the plaintiffs is sufficient, though it does not mention them as partners. As to the other objection, the stat. 2 *W. 4. c. 39. s. 21.* enacts, that the writs thereinbefore authorised shall be the only writs for the commencement of personal actions in any of the superior courts at *Westminster*, in the cases to which such writs are applicable. We think that act repeals the rule of court, *Hil. T. 2 & 3 G. 4.* The rule will therefore be absolute.

(a) 9 *B. & C.* 153.

1834.

LITLEDALE J. concurred.

BODFIELD
against
PADMORE.

TAUNTON J. I am of the same opinion. I should have thought before, that the indorsement insisted upon was unnecessary, but that the late books of practice appeared to treat the rule of 2 & 3 G. 4. as still subsisting. On the motion before me, I referred to the case of *Kenrick v. Nanney* (a), cited in Mr. *Tidd's* Third Supplement (b), and it was not brought to my attention that that case was determined before the passing of 2 W. 4. c. 39. The rule must be made absolute.

PATTESON J. concurred.

Rule absolute.

(a) 1 Dowl. P. C. 58.

(b) The Act for Uniformity of Process, by *W. Tidd, Esq.* (with notes, &c.) 1832. Page 15. note (c). That note, however, refers to the rule of 2 & 3 G. 4. as "a former rule," by which the plaintiff's attorney "was required," &c.

BACKHOUSE *against* HARRISON.

To an action by an indorsee against the indorser of a bill of exchange, who had lost the bill by accident, it is a good defence that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the person from whom he took it, had no title; or that the plaintiff was guilty of gross negligence in taking it.

But it is no defence that he took it under circumstances in which a prudent and cautious man would not have taken it.

ASSUMPSIT by the plaintiff, an officer of the *York City and County Bank Company* (a), upon two bills of exchange, for 26*l.* 19*s.* 9*d.*, and 20*l.*, indorsed to the company, against the defendant as an indorser. At the trial before *Alderson J.* at the *Yorkshire Spring assizes* 1833, it appeared, that about two o'clock P. M., on the 25th of *September* 1832 (being the first day of *Howden fair*), a man dressed like a sailor, accompanied

(a) 7 G. 4. c. 46. s. 9.

by

by another person dressed in the same manner, came to the company's office at *Howden*, and requested one *Clough*, their clerk, who managed their business there, to discount the bill for 26*l.* 19*s.* 9*d.* The bill being much discoloured, *Clough* asked how it came to be so. The man said it had fallen, with his pocket-book, into the *Knottingley* and *Goole Canal*, and that he had been searching two days and two nights for it. This statement was corroborated by his companion. *Clough* then looked at the bill, and seeing the names of *J. & R. Harrison* upon it, asked the man how he came by it. He said he had got it from those gentlemen in payment for a cargo of coals; that he had two vessels in which he traded between *Hull* and the *West Riding*, and that he had come to *Howden* to purchase two horses to draw his vessels up and down the canal. *Clough* then agreed to discount the bill, and offered it to the man to indorse, but he said he could not write, upon which *Clough* wrote the name given to him by the man (*William Moore*), to which the latter affixed his mark. *Clough* stated, in evidence, that it was not uncommon for persons unable to write to have such bills. Having received the money for this bill, the man produced the other bill, and said, that if the money he had received was not sufficient to pay for the horses, he would return and get the second bill discounted. In an hour and a half he returned for that purpose, and *Clough* discounted the bill for 20*l.* *Clough* asked the man if he was known in the town. He said he did not know any one there.

For the defendant it was proved, that the bills in question were lost by a sister of the defendant, she having dropped her reticule containing them into the canal between *Goole* and *Knottingley*, on the 9th of
September

1834.

BACKHOUSE
against
HARRISON

1834.

BACKHOUSE
HARRISON.

September 1832, and that the reticule and its contents were found by *Moore*. It was proved by a clerk of the Bank of *England*, that it was the practice there, and at all its branch banks, not to discount bills for strangers without requiring a reference; nor to exchange Bank of *England* notes for strangers, and certainly not a dirty bill for a man who could not write. The same statement was made as to the practice of several other banks. The jury found, upon questions specially submitted to them by the learned Judge, that the plaintiff took the bills bona fide, but under such circumstances that a reasonable, cautious man would not have taken them. They also found, that the defendant had not used due diligence in making the loss known. The learned Judge then directed the jury to find a verdict for the defendant, but reserved liberty to the plaintiff to move to enter a verdict for the amount of the bills, if the Court should be of opinion that the defendant, having been guilty of the first negligence, was thereby estopped from setting up the negligence of the plaintiff. *F. Pollock* was to have shewn cause, but in his absence (*Jan. 27th*) the Court first heard

Cresswell, for the plaintiff. If the defendant was guilty of the first negligence, by not advertising the loss of the bills, the plaintiff was entitled to recover. [*Denman C. J.* Does not *Easley v. Crockford (a)* bear on that point?] That was a different case. There the plaintiff (in trover) proved that, in *September 1830*, he went to a public meeting, where he was robbed of a 200*l.* Bank of *England* note. He advertised his loss in the newspapers, and in *June 1832* the note was traced

(a) 10 *Bing.* 243.

to the possession of the defendant, who stated that he received it in payment of a bet on the *Derby*, but he could not say from whom. The jury found a verdict for the plaintiff, and that the note was received by the defendant without due circumspection. A rule was obtained for a new trial, on the ground that the *plaintiff* (who had lost the note), had not taken due care of his property, but was instrumental to his own loss in going to a mixed assembly with a large sum of money in his pocket. The Court thought that the plaintiff's negligence, in having attended a mixed meeting with so large a sum, did not confer a title to the note on the defendant, who had received the note without ordinary care; and that the latter had no title as against the real owner. Here the action is brought by a banker, who discounted these bills, against an indorser, who lost them. Assuming that the want of due caution in a person discounting a bill, though he does it *bonâ fide*, may be insisted upon in an action by the real owner in an ordinary case; still the owner is not at liberty to allege it, if he himself has been guilty of the first negligence, and thereby in some measure instrumental to the loss which he seeks to throw upon the holder. But, secondly, it is no defence that the plaintiff took the bill *bonâ fide*, but under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained. The defendant is bound to show that the plaintiff was guilty of gross negligence at least. [*Taunton J.* That point was decided by us, this term, in *Crook v. Jadis*(a)] The question, whether a bill or note has been taken *bonâ fide*, involves in it the question, whether it has been taken with due caution,

1834.

BACKHOUSE
against
HARRISON.

(a) *Anti*, 909.

1884

1881
 BACKHOPE
 against
 HOLROYD

Per *Holroyd J.* in *Gill v. Cubitt* (a): *Bayley J.* there said, that he considered it was parcel of the *bonâ fides*, whether, the plaintiff had asked all those questions which, in the ordinary and proper mode in which trade is conducted, a party ought to ask (b); and in a case at nisi prius, a few days ago, *Parke J.* expressed his opinion that negligence only bore upon the question of *bonâ fides*. The attempt to insist on want of caution, as distinguished from want of good faith, has only led to inconvenience. The plaintiff, then, is entitled to a verdict, because gross negligence was not proved: and assuming that the fact of the plaintiff having taken this bill *bonâ fide*, but under circumstances which ought to have excited the suspicion of a prudent man, would have been a defence in an ordinary case, still the defendant, not having given notice to the public of his loss, is estopped from making that defence. Such notice might have prevented the plaintiff from discounting the bills. [*Denman C. J.* In *Snow v. Peacock* (c). *Best C. J.* says, that one who has lost a note payable to bearer, ought immediately to give notice of his loss to the public, in such a manner as is most likely to prevent innocent persons from taking it.]

F. Pollock and *Martin* afterwards shewed cause. The defendant, by not having given notice to the public of the loss of the bills, is not estopped from saying that the plaintiff took them under circumstances which would have excited the suspicion of any prudent man; and that is a sufficient defence to this action. His misconduct, in not having advertised his loss to the public, would be no answer to an action of trover brought by him to

(a) 3 B. & C. 477.

(b) P. 474.

(c) 3 Bing. 418.

recover the bills. The property in the bills was at one time in the defendant. The question is, whether he has parted with them under circumstances which divested the property. If it still continued to be in him, and another party discounted the bills, under circumstances of suspicion which did not warrant his doing so, the owner may recover them in trover. In the case of a collision of two ships, if an error has been committed in the management of either, the owner of that ship will have no right of action against the owner of the other. The plaintiff acquired no property in the bills under the circumstances in which he took them. The fact of the defendant not having advertised their loss cannot estop him from saying that the plaintiff had no property in them. The plaintiff took the bills under circumstances which gave him no right to hold them, and the defendant's omission to advertise will not confer that right. The finding of the jury is sufficient to entitle the defendant to a verdict. That the Banking Company could acquire no property in the bills, having taken them under circumstances in which a reasonable and cautious man would not have taken them, is well established; *Gill v. Cubitt (a)*, *Dowd v. Halling (b)*.

1854.
 BACKBUSH
 against
 HARRISON.

DENMAN C. J. This case involves a mixed question of law and fact. The law upon the subject is not very well settled; and I think the rule should be absolute, if not for entering a verdict for the plaintiff, at least for a new trial. I think, upon the whole, that the plaintiff is entitled to recover. To constitute a valid defence to the action, it was incumbent on the defendant to shew that the agent of the banking company who discounted the bills had been guilty at least of gross

(a) 3 B. & C. 408.

(b) 4 B. & C. 330.

1824.

—
 Defendant
 against
 Plaintiff

negligence. The finding of the jury does not go to any thing like that extent; nor was there any evidence to warrant such a finding. Then as to the other question, whether negligence in the loser of a bill or note will deprive him of a defence which he otherwise would have against the holder, that must depend on the circumstances of each particular case. But I must say that I think the omission of the defendant here, to advertise the loss of bills which had gone to the bottom of a canal, was not such negligence as to deprive him of right of defence which he otherwise might have had. As the finding of the jury with respect to the plaintiff's want of caution was no answer to this action, and the plaintiff must ultimately recover, it might perhaps be more to the defendant's advantage that the rule should be made absolute for entering a verdict for the plaintiff than for a new trial; but at all events it must be made absolute for a new trial.

LITLEDALE J. It was no defence to the action that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained: the defendant was bound to shew that the plaintiff had been guilty of gross negligence. That was decided in *Crook v. Jadis (a)*. The plaintiff is therefore entitled to recover.

TAUNTON J. *Crook v. Jadis (a)* shews that the plaintiff is entitled to recover unless gross negligence has been made out. That was not found by the jury, and I think the negligence proved was not sufficient to have warranted such a finding. The other point, therefore, does not arise.

(a) Ant. 903.

PATTESON J. The learned Judge has reserved liberty to the plaintiff to move to enter a verdict, if the Court should be of opinion that the defendant, who is found by the jury to have been guilty of the first negligence by not advertising the loss of the bills, is thereby estopped from setting up the plaintiff's want of due caution as a defence to the action. We cannot therefore order a verdict to be entered for the plaintiff without deciding the point reserved by the learned Judge, whether or not the defendant was so estopped; but I think it unnecessary to decide that point, because I am of opinion that the first fact found by the jury did not amount to a defence to the action. I have no hesitation in saying that the doctrine first laid down in *Gill v. Cubitt* (a), and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man, cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bonâ fide*, but under the circumstances mentioned in *Gill v. Cubitt*, does not acquire a property in it. I think the fact found by the jury, here, that the plaintiff took the bills *bonâ fide*, but under such circumstances that a reasonable, cautious man would not have taken them, was no defence. The rule must be absolute for a new trial.

Rule absolute for a new trial (b).

(a) 3 B. & C. 466.

(b) The action was afterwards compromised.

1834.

Backhouse
against
Hannachi.

1884.

BY A H
MUNING
-RECTOR T
Friday,
Jan. 31st.

HAYS against TROTTER.

Defendant in a cause being advised to pay 48*l.* into Court, gave his attorney 50*l.* for the purpose of making such payment, which was done. The attorney afterwards delivered his bill to the client, not including the 48*l.*, and on taxation more than one sixth was taken off. The attorney then claimed to add the 48*l.* (which would have made the deduction less than one sixth), stating that the item had been inadvertently omitted.

Quere, whether such item was chargeable as a disbursement by the attorney? but

Held, that, at all events, the attorney, not having treated it as a disbursement in making out his bill, could not claim to insert it as such for the purposes of the taxation.

ALEXANDER had obtained a rule to shew cause why the Master should not review his taxation of the bill of the defendant's attorney as to certain items, and pay the costs of such taxation should not be allowed to the defendant, more than one sixth of the bill having been taxed off. The facts relating to the costs of taxation, (which alone are material) were as follows:— The defendant, being advised to pay 48*l.* into Court in one of the causes to which the bill referred (*Backhouse v. Trotter*), paid to the above-mentioned attorney, who acted for him in that cause, 50*l.* for the purpose of paying into Court the required sum. The attorney, in his bill of costs, neither charged the 48*l.*, nor gave credit for the 50*l.*, which omission he, in his affidavit, ascribed to inadvertence. The bill, amounting to 188*l.*, was taxed before the Master, the attorney's clerk attending on his behalf; and on that occasion no reference was made to the above sum of 48*l.*, except that the clerk offered to give the defendant credit for the balance between that and the 50*l.* The Master made his allocatur, deducting 28*l.* from the bill, which, being more than one sixth, the defendant was allowed his costs of taxation. After the parties had separated, the attorney's clerk returned to the Master, and stated that the 48*l.* ought to have been included in the bill as an item of disbursement. The Master allowed it to be inserted, and it then stood as follows:— "Yourself ats. *Backhouse*. Paid into Court, 48*l.*" The Master appointed another

another meeting, which the parties attended. The bill was taxed anew, the 48% being included, and credit given to the defendant for 50%; and the same sum as before, 282, was taxed off; but the bill having now been increased to 186%, the deduction did not, as before, amount to one sixth. The Master, therefore, refused the defendant his costs of taxation. The defendant insisted that the introduction of the 48% as a disbursement was a mere after-thought, and should not have been permitted after the allocation first made.

Cresswell in this term shewed cause. (a) This was a payment of money into court by the attorney in the progress of a cause, and was a proper item in his bill. The case is not distinguishable from *Pringle v. Shackleton* (b), where a client at the assizes, after briefs had been delivered to counsel, paid his attorney 65% to be disbursed in fee to them; and it was held that the attorney was, nevertheless, entitled to include those fees in his bill of costs. It is laid down in *Tidd's Practice*, p. 396. 9th ed. (citing that case), that "if a client, in the course of a cause, advances money to his attorney for specific disbursements in the cause, those disbursements must nevertheless be included in the bill of costs." The disbursement by the attorney is not a mere lending of money, but a matter done in the cause: he is bound to treat it as an item of account in his bill, though he has received from his client more than will cover the amount. The money, here, was furnished to the attorney because he had to pay a sum into court; but not as a specific sum to be so

1884.

HAYS
against
TAUNTON.

(a) Before Denman C. J., Littleale, Taunton, and Patteson J.

(b) Tawnt. 536.

1834

HALL
against
Taunton.

applied. [*Alexander*, contra, mentioned the case of *Woolaston v. Hudson* (a), decided a few days before in the Exchequer.] There it was held that a payment made by the attorney, for which he had received 26*l.* from the client, could not be included as a taxable item in his bill; but that 26*l.* was a specific sum given to pay the debt and costs, after the cause had been brought to conclusion. The present is the case of an attorney in a suit paying money into court in the progress of it.

Alexander, contra. In *Hindle v. Shackleton* (b) the payment made was a disbursement in the due and ordinary progress of the cause: In *Woolaston v. Hudson* (a), *Bolland B.* gave the client the costs of taxation, because the item there in question was not such a disbursement, distinguishing the case, on that ground, from *Hindle v. Shackleton* (b): and the Court of Exchequer refused a rule for rescinding his order. It was there said that the sum paid, being for the debt and costs of suit, was one which the client could have paid over at once, if the attorney had not; this was a payment of a similar nature, and whether it be made during, or at the end of the cause, can be no real ground of distinction. The subject of taxation under the stat. 2 G. 2. c. 23. s. 9., is the bill delivered by the attorney, of his fees, charges, and disbursements. This item was not one of the fees, charges, and disbursements, in the bill so delivered, but was added subsequently, when the bill had been before the Master. [Taunton J. "Disbursements in the ordinary progress of a cause," is a very vague expression.]

Cur. adv. vult.

(a) 2 Dowl. P. C. 360. as *Woolston v. Hodgson*.

(b) 1 Taunt. 536.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:— We think, under the circumstances, that the attorney was not entitled to do what he has done. Without going into the particular facts, it is enough to say that, having delivered his bill, and at that time, not considered the payment in question as a disbursement in the cause, he could not afterwards turn it into a disbursement, to avoid the operation of the statute as to costs of taxation. The rule will therefore be absolute.

1834.

HAB
against
TARRANT

Rule absolute.

JAMES *against* WILLIAMS.

ASSUMPSIT on the following guarantee:— “As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks—say the 4*th* of *January* 1833.” At the trial before the under-sheriff of *Middlesex* by a writ of trial under the 3 & 4 *W. 4. c. 42. s. 17.*; the guarantee (which was in writing) was produced in evidence, and the under-sheriff nonsuited the plaintiff, on the ground that the consideration did not appear on the face of the instrument, as there was no stipulation that the creditor should wait six weeks for payment. In this term *Barstow* obtained a rule for a new trial. In moving for the rule he contended that it was not necessary that the consideration should be stated in the guarantee in express words, but it was sufficient if it could be collected from the words used, by fair and necessary implication; and for this he

In an agreement in writing to pay the debt of another, the consideration must be either stated in express words or to be implied from the terms used. A letter, therefore, from the defendant to the plaintiff in the following words— “As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day,” was held not to satisfy the statute of frauds.

cited

1884.

James
v. James
Winnick.

cited *Newbury v. Armstrong* (a), where a guarantee was in these words: — "I agree to be security to you for J. C., late in the employ of J. P., for whatever you may entrust him with while in your employ, to the amount of 50*l*;" and it was held that the consideration sufficiently appeared. [*Patteson J.* observed, that in that case the words of the guarantee were prospective.] He also cited *Coe v. Duffield* (b), and the judgment of *Richardson J.* in that case.

R. V. Richards in the same term shewed cause against the rule before *Patteson J.* in the Bail Court, and admitted that the consideration need not be in express words on the face of the guarantee, but might be collected from it by fair and necessary implication; he contended, however, that such an implication could not be raised in this case, and he relied on *Wain v. Warters* (c), *Cole v. Dyer* (d), as shewing that there was no ground for inferring a consideration from the words here used.

Cur. adv. vult.

PATTESON J. now delivered the judgment of the Court. This case was argued before me in the Bail Court, and the judgment which I am about to give must be considered my own, and not that of the whole Court. It was an action on a guarantee, and the under sheriff nonsuited the plaintiff on the ground that no consideration appeared on the face of it. *Wain v. Warters* (a), the authority of which was once doubted, but

(a) 6 Bing. 301.

(b) 7 B. Moore, 252.

(c) 5 East, 10.

(d) 1 Crompton & J. 451. 1 Tyrw. 304.

afterwards

afterwards confirmed by *Saunders v. Wakefield* (a), was referred to. The authority of that case was not questioned here, but it was contended that the consideration did sufficiently appear on the face of the writing. The rule of construction on the subject is clear, and indeed was not disputed. The consideration need not be stated in express words on the face of the instrument; it may be collected or implied from the instrument itself, but then it must be collected not as matter of conjecture, but with certainty. *Wain v. Warlters* (b) is in point. There the guarantee was, "I will engage to pay you (the plaintiff), by half past four this day, 56*l.* and expenses, on bill to that amount on *Hall*." Now that is precisely the same case in principle as the present, for whether the promise be to pay within six hours from the time of signing the guarantee, or within six weeks, is immaterial, if it can be collected that a forbearance by the creditor during the time was contemplated. If any agreement not to sue the principal debtor is to be implied in this case, it ought also to have been implied in *Wain v. Warlters*, but there it was conceded that the consideration did not appear on the face of the writing, and it was argued that it need not so appear. The plaintiff's counsel there did not contend that it was necessarily to be implied, from the promise of the surety to pay at a future time, that the consideration for so doing was forbearance towards the principal debtor in the mean time. And I am of opinion that no inference is necessarily or fairly to be drawn from the terms of the guarantee in this case, that the consideration for the defendant's promise was forbearance for six weeks to the principal debtor. *Cole v.*

1884.

—
 Jacobs
 against
 Wainman.

(a) 4 B. & A. 595.

(b) 5 East, 101.

1834.

JAMES
against
WILSON.

Dyer (a) is not distinguishable from this case. There a guarantee for the payment of debt and costs in an action pending against a third person, unless paid by a certain day, was given in writing. An action having been brought on the guarantee, the declaration alleged a stay of further proceedings in the first action as the consideration for the promise, and it was held that no such consideration appeared on the written instrument, or could necessarily be implied from it so as to satisfy the statute of frauds. That case shews that you must be able to fix upon the consideration on the face of the instrument, not as a matter of conjecture, but as matter of undoubted certainty. *Coe v. Duffield (b)* was cited in support of the rule on account of what was there said by *Richardson J.*, and certainly whatever fell from that learned Judge would be great authority. There the guarantee was given on the 3d of *April* 1820, but on the 29th of *March* the defendant had written to the plaintiff that, feeling himself interested for *Wilson* (the principal debtor) he could not refrain from giving this security, if the plaintiff would agree to his terms, which were to allow *Wilson* two years to pay the whole sum by instalments, and accept the defendant's guarantee to see it paid in that time. *Richardson J.* said, not that the guarantee itself contained a consideration, but that the declaration might have been framed on the first letter, viz. that of the 29th of *March*, which was prior to the guarantee, and contained the terms on which the guarantee was to be given, and shewed a sufficient consideration. The rule for setting aside the nonsuit must be discharged.

Rule discharged.

(a) 1 *Crompt. & J.* 461. 1 *Tyrrw.* 304.(b) 7 *B. Moore*, 252.

1834

The KING *against* The Justices of MIDDLESEX,
In Re BOWMAN.

Tuesday
Jan. 21st.

A RULE had been obtained by *Bodkin* in last term calling on the justices of the county of *Middlesex* to shew cause why a writ of mandamus should not issue commanding them to make up the record of the conviction of *James Bowman* at the general quarter sessions of the peace and sessions of oyer and terminer, held in the month of *July* 1833 at the sessions house for the said county, and to give a copy of such record to the said *James Bowman* or his attorney.

A party found guilty by a jury at a session irregularly holden is entitled to have the record of the proceedings correctly made up according to the fact; and this Court will grant a mandamus to the justices to make up such record.

It appeared from the affidavits, that the sessions were duly held on *Monday* the 1st of *July*; that bills of indictment were then presented to the grand jury, and witnesses sworn, and that, among others, an indictment for felony was presented, and witnesses sworn, against the prisoner *Bowman* on that day. That on the same day the Court adjourned, and the justices did not meet again for general business till *Thursday*, *July* 4th. That the adjournment was till *Tuesday* the 2d; on which day, no justices being present, the court was opened by the crier; some justices attended at different times during the day, and in the evening the crier adjourned the court, no justices being present. That on *Wednesday* the court was again opened and adjourned as before by the crier, who stated, on enquiry subsequently made, that it had always, during his time, been usual so to open and adjourn the court while the grand jury were sitting, though business was not transacted

1884

The King
against
The Justices of
Middesex;
Et Al
Bowman.

acted in court. That the grand jury continued sitting; and on *Wednesday* (the 9d), two justices attended and received bills from them, and amongst others a true bill against *Bowman*. That on *Thursday* (4th), the sessions met and heard appeals; and on *Friday*, *Bowman* was tried, among others, and convicted, and was ordered to be transported, and an order for his transportation was made out by the deputy clerk of the peace. That on a subsequent day, upon the trial of a prisoner at the *Old Bailey*, it was objected by counsel that the bill of indictment had not been duly found at the above sessions, inasmuch as the prosecutor and witnesses had been sworn on one of the days subsequent to the adjournment on *Monday July 1st*, after which, as it was contended, the court of quarter sessions had never regularly met. That afterwards a similar objection was made at the said court of quarter sessions on the trial of a party charged there with an assault. That the justices allowed the objection, thereby determining that the said quarter sessions had lapsed on the 2d of *July*; and the court thereupon separated. That a special commission afterwards issued, under which several prisoners who had before been acquitted and convicted at the *Old Bailey* sessions upon bills found under the same circumstances as those above stated, were again tried at the *Old Bailey*; but *Bowman* was not put upon his trial before the commissioners. That, by direction of the secretary of state, fresh bills of indictment were preferred, at the *Middlesex* session, *September* 1883, against the several prisoners, including *Bowman*, who had been convicted at the lapsed session. That a true bill was found against *Bowman*, and he was thereupon arraigned at the *Old Bailey* sessions for the same felony as that charged in the former

former indictment. That on being called upon to plead, he pleaded his former conviction, and time was given him to apply to the clerk of the peace for a copy of the record of the former conviction, which could not be obtained, no such record having been made up. That the case was then deferred till the 9th of *September*, upon which day, in pursuance of a notice given to the deputy clerk of the peace, the latter attended at the *Old Bailey* with the documents touching the first indictment, conviction, and sentence, but without any formal record whereby the prisoner could substantiate his plea. That, by two successive orders of the Court, the prisoner was remanded from session to session, in order that he might obtain the copy of the record; and that an application was made for it on his behalf at the *Middlesex* sessions, but refused. It appeared also from the affidavit of the deputy clerk of the peace, that it was not usual to make up records of proceedings at the time of their taking place; that no record of the conviction of *James Bowman* had been made up, and that he (the clerk) believed no such record could be made up, inasmuch as according to the determination of the justices, the said Court of quarter sessions of the peace which commenced on the 1st of *July*, lapsed on the following day.

Sir *James Scarlett* and *Barstow*, in this term (*January* 21st), shewed cause. The sessions not having been properly adjourned on the 2nd of *July*, it is impossible to make up a valid record of the conviction. The trial of the prisoner was without authority, and every conviction or acquittal, after such adjournment, was a nullity. The prisoner's object is to treat the record as valid for the purpose of pleading *autrefois* convict;

and

1886.

The King
against
The Prisoners of
Middlesex
In Re
Bowman

1834.

The King
against
The Justices of
MIDDLESEX,
In Re
BOWMAN.

and then, having succeeded on that plea, to treat the record as invalid, and one by which he is not subject to punishment. If the Court were to make the rule absolute, and the justices should return a perfect record of conviction, the prisoner might bring a writ of error and assign error in fact. [Patteson J. That would be to contradict the record, which he cannot do. *Res v. Carlisle. (a)*]. If they returned a record stating the fact truly, then the record would be bad in point of law.

Bodkin, contra, was stopped by the Court.

DENMAN C. J. The prisoner has a right to have the record of the proceedings which passed at sessions correctly made up and to make any use of it that he can. The rule must be so altered as to require the justices to make up a record not of the conviction but of the proceedings had and taken against the prisoner *Bowman*.

LITLEDALE, TAUNTON, and PATTESON, Js. concurred.

Rule absolute to make up the record,
as above (b).

(a) 2 B. & A. 362.

(b) The record was made up, and, on being produced at the Old Bailey sessions, April 1834, was held not to support the plea of *autrefois convict*. *Res v. Bowman*, 5 Carr. & Payne, 337.

1852

WRIGLEY against SMITH.

THIS was an action of assumpsit. Plea, general issue. At the trial before Gurney B. at the Lancashire Spring assizes 1833, it appeared that the defendant's son, having been arrested for 55l., the plaintiff, at the defendant's request, and upon his depositing 40l. in the hands of the sheriff, became bail for the defendant's son, and that the plaintiff having afterwards consented to allow the defendant to receive from the sheriff's officer the 40l. deposited, the defendant signed the following undertaking: — "I the undersigned John Smith the elder, do hereby undertake to hold harmless and indemnified John Wrigley of and from all costs, charges, damages, or other expenses or liability which may be incurred by him, or arise, owing to and in consideration of the said John Wrigley having become bail for my son, the defendant in this action." The plaintiff having incurred costs in surrendering the defendant's son, the present action was brought. It was objected that the undertaking ought to have been stamped. The learned Judge directed a verdict to be taken for the plaintiff, but reserved liberty to move to enter a nonsuit.

The son of J. S. having been arrested, and one W. becoming his bail, J. S. signed an agreement to indemnify W. from all liability which he might incur in consequence: Held, that as one of the liabilities to which J. S. thereby subjected himself was to pay the debt for which the son of J. S. had been arrested, and as that must have amounted to 20l., the subject-matter of the agreement must have been of that value, and the agreement therefore required a stamp within the 55 G. 3. c. 184. *sched. part 1.*

Blackburne in *Easter* term having moved accordingly,

Alexander, in this term (*January* 28th), shewed cause. The agreement did not require to be stamped, by the

1834.

WRAIGLEY
against
SMITH.

55 G. 3. c. 184. sched. part 1. (a), because the subject matter of it does not appear to be of the value of 20*l*. In *Chadwick v. Sills* (b), a memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner was held, first by *Holroyd J.* at Nisi Prius, and afterwards by this Court on motion for a new trial, to be admissible in evidence to shew the terms on which the goods were received, without a stamp, although the value of the goods was above 20*l*., the wharfage being of a less amount. In *Latham v. Rudley* (c), a memorandum "Received of *Latham and Co.*, a paper parcel directed to Messrs. *Hoare and Co.*, 62. *Lombard Street*, value 260*l*. which we agree to deliver to them to morrow, fire and robbery excepted, carriage paid here," given by a carrier in receipt of goods at *Dover*, was held to be admissible in evidence without a stamp, as being an agreement the subject matter of which did not exceed 20*l*. In *Doe v. Avis* (d), it was holden that an agreement, signed by a tenant, to hold premises with scheduled fixtures at 2*s*. 6*d*. per annum, determinable at six months notice, need not be stamped; the subject matter of the contract, viz. the right to occupy, not being shewn to be above the value of 20*l*.: Lord *Tenterden* there said, "The words of the act are so ambiguous that the party objecting ought to make out the affirmative, which is not shewn." And in *Orford v. Cole* (e), *Bayley J.* ruled that a letter produced to prove a promise of marriage need not be stamped, and on the case being afterwards discussed on motion for a new trial,

(a) "Agreement,—where the matter thereof shall be of the value of 20*l*. or upwards."

(b) *Ryan & M.* 15.

(c) *Ibid.* 13.

(d) *M. S. 2 Chitty's Statutes*, 964. n. (x) (e) 2 *Starkie, N. P. C.* 351.

he

he observed that the enactment imposing the duty did not operate at all unless the subject matter of the agreement was of the value of 20*l.*; and that this supposed that the value of the contract was measurable in order to ascertain whether the subject matter did or did not amount to 20*l.* In *Rex v. Enderby (a)*, on appeal against an order of removal, the appellants, to shew that the pauper served more than forty days as an apprentice in the respondent parish, with the assent of his master, produced a written paper purporting to certify that the father of the pauper agreed to give his master 8*s.* for the term of his apprenticeship; and it was held that there being nothing to shew that the subject matter of the agreement was of the value of 20*l.*, it did not require a stamp. So here, there was nothing to shew that the subject-matter of the agreement was 20*l.* [*Taunton J.* The party was arrested for 35*l.*, and he could not have been legally arrested for less than 20*l.*] The subject-matter of the agreement was not the sum for which the defendant's son had been arrested, but the liability of his bail to pay costs. [*Patteson J.* Your argument goes to shew that a contract of indemnity would never require a stamp. The agreement by the defendant is to hold the plaintiff harmless and indemnified from all costs, charges, damages or other expenses or liability which he may incur in consequence of his having become bail. Now one of those liabilities was, that he might have to pay the debt for which the defendant's son had been arrested.]

1834.

 WRIGLEY
 against
 SMITH.

Blackburne contra, was stopped by the Court.

(a) 2 B. & Ad. 205.

1894.

WRIGHT
against
SMITH.

DENMAN C. J. A liability which the defendant might have incurred by the terms of his undertaking to indemnify the plaintiff, was that he might be called upon to pay the debt for which the defendant's son had been arrested. Now, although the costs, charges, and damages were uncertain, the debt for which this party had been arrested, must certainly have amounted to 20*l*. The agreement, therefore, required a stamp. The rule for entering a nonsuit must be made absolute.

LITLEDALE, TAUNTON, and PATTESON Js., concurred.

Rule absolute.

END OF HILARY TERM.

REGULÆ GENERALES.

Hilary Term, 4 W. 4.

WHEREAS it is provided by the statute 3 & 4 W. 4. c. 42. s. 1. that the Judges of the superior courts of common law at Westminster, or any eight or more of them, of whom the chiefs of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient, which rules, orders, and regulations were to be laid before both houses of parliament, as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both houses of parliament, but after that time should be binding and obligatory on the said courts, and all other courts of common law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament:

Provided that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence in any case wherein he then was, or thereafter should be entitled so to do by virtue of any act of parliament then or thereafter to be in force:

It is therefore ordered, that from and after the first day of *Easter* term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force:—

First, General Rules and Regulations.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

1834.

2. No entry of continuances by way of imparlance, curia advisare vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the jurata ponitur in respectu, which is to be retained.

Provided that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea puis darrein continuance is now by law pleadable in Banc or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the Court or a Judge shall otherwise order.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Provided that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. And whereas by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the said act of the 3 & 4 W. 4. c. 42. s. 23. the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, are greatly enlarged :

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each ; nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Ex. gr. — Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So counts for not giving, or delivering, or accepting a bill of exchange, in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

1834.

So counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange, or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro rata itineris* upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed.

In actions of tort for misfeasance several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged, in *indebitatus assumpsit*, to be due in respect of several matters; ex. gr., for wages, work, and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts, is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract, in the same count.

Ex. gr. — Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar, in *replevin*, are within the rule), are not to be allowed.

Pleas of *solvit ad diem*, and of *solvit post diem*, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

1834.

Pleas of an agreement to accept the security of *A. B.* in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct and to be allowed.

But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the locus in quo, and of the defendant's right to an easement there; pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct and are to be allowed.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of a right of way over the locus in quo, varying the termini or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances introduced in violation of the rule be struck out at the cost of the party pleading; whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject-matter of complaint is bona fide intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall endorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed.

7. Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance,

cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings; and, further, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issues or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance with respect to which the Judge shall so certify.

8. The name of a county shall, in all cases, be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Provided that, in cases where local description is now required, such local description shall be given.

9. In a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of "precludi non," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action. Provided that nothing herein contained shall extend to cases where an estoppel is pleaded.

10. No formal defence shall be required in a plea, and it shall commence as follows: — "The said defendant, by _____, his attorney, [or, "in person," &c.] says that"

11. It shall not be necessary to state, in a second or other plea or avowry, that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

1884.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial.

14. The form of a demurrer shall be as follows:—"The said defendant, by _____, his attorney [or, "in person," &c., or, "plaintiff,"], says, that the declaration [or, "plea," &c.] is not sufficient in law," shewing the special causes of demurrer, if any.

The form of a joinder in demurrer shall be as follows:—"The said plaintiff [or, "defendant,"] says, that the declaration [or, "plea," &c.] is sufficient in law."

15. The entry of proceedings on the record for trial, or on the judgment roll (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the assizes, or any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

17. When money is paid into Court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, *mutatis mutandis*:—

"C. D. } The _____ day of _____. The
 ats. } defendant, by _____, his attorney [or, "in person,"
 A. B. } &c.], says, that the plaintiff ought not further to maintain
 his action, because the defendant now brings into Court the sum of
 £ _____, ready to be paid to the plaintiff. And the defendant further
 says, that the plaintiff has not sustained damages [or, in actions of debt,
 "that he is not indebted to the plaintiff,"] to a greater amount than the
 said sum, &c. in respect of the cause of action in the declaration
 mentioned, and this he is ready to verify. Wherefore he prays judgment
 if the plaintiff ought further to maintain his action."

18. No rule or Judge's order to pay money into Court shall be necessary, except under the 3 & 4 W. 4. c. 42. s. 21., but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

19. The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty, in that case,

1834.

case, to tax his costs of suit, and, in case of nonpayment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply "that he has sustained damages [or, "that the defendant is indebted to him," as the case may be,] to a greater amount than the said sum;" and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment, and his costs of suit.

20. In all cases under the 3 & 4 W. 4. c. 42. s. 10., in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form: — "[Venua.] A. B., by E. F., his attorney [or, "in his own proper person," &c.], complains of C. D. and G. H., who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H.," &c. [the same form to be used, mutatis mutandis, in cases of arrest or detainer].

21. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

Pleadings in particular Actions.

I. *Assumpsit*.

In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr. — In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailers, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach. In an action of indebitatus assumpsit for

1834.

goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; e. g., the drawing or making, or indorsing, or accepting or presenting, or notice of dishonour of the bill or note.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. Ex. gr.: Infancy — coverture — release — payment — performance — illegality of consideration, either by statute, or common law — drawing, indorsing, accepting, &c. bills or notes by way of accommodation — set-off — mutual credit — unseaworthiness — misrepresentation — concealment — deviation — and various other defences, must be pleaded.

4. In actions on policies of assurance the interest of the assured may be averred thus: — “That *A.*, *B.*, *C.*, and *D.*, or some or one of them, were or was interested,” &c.; and it may also be averred, “that the insurance was made for the use and benefit, and on the account, of the person or persons so interested.”

II. *In Covenant and Debt.*

1. In debt on specialty or covenant, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of “nil debet” shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that “he never was indebted in manner and form as in the declaration alleged;” and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

4. In other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III. *Detinue.*

1834.

III. *Detinue.*

The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV. *In Case.*

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. Ex. gr.—In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not the plaintiff's right of way; and, in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff, in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

V. *In Trespass.*

1. In actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name or abutments, or other description; in failure whereof the defendant may demur specially.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. In

1834.

3. In actions of trespass de bonis asportatis, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass quare clausum fregit, the defendant pleads a right of common of pasture for divers kinds of cattle; ex. gr., horses, sheep, oxen, and cows,—and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Provided, nevertheless, that nothing contained in the fifth, sixth, or seventh of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of *Easter* term next.

Issues, judgments, and other proceedings in actions commenced by process under 2 W. 4. c. 39., shall be in the several forms in the schedule hereunto annexed, or to the like effect, mutatis mutandis. Provided that, in case of non-compliance, the Court or a Judge may give leave to amend.

Form of an Issue in the King's Bench, Common Pleas, or Exchequer.

In the King's Bench; or,
In the Common Pleas; or,
In the Exchequer.

^a Date of
declaration.

The^a day of , in
the year of our Lord 18 .

[Venue.] *A. B.*, by *E. F.*, his attorney [or, in his own proper person, or
by *E. F.*, who is admitted by the Court here to prosecute for the said
A. B.,

A. B., who is an infant within the age of twenty-one years, as the next friend of the said *A. B.*, as the case may be], complains of *C. D.*, who has been summoned to answer the said *A. B.* [or, arrested or detained in custody], by virtue [or, served with a copy, as the case may be,] of a writ issued on ^a the day of , in the year of our Lord 18 , out of the Court of our Lord the King before the King himself, at *Westminster* [or, out of the Court of our Lord the King before his Justices at *Westminster*, or, out of the Court of our Lord the King before the Barons of his Exchequer at *Westminster*, as the case may be], for that

1834.

^a Date of first writ.

[Copy the declaration from these words to the end, and the plea and subsequent pleadings, to the joinder of issue.]

Thereupon the sheriff is commanded that he cause to come here, on the day of , twelve, &c., by whom, &c., and who neither, &c., to recognize, &c., because as well, &c.

No. 2.

Form of Nisi Prius Record, in the King's Bench, Common Pleas, or Exchequer.

[The placita are to be omitted. Copy the issue to the end of the award of the venire, and proceed as follows:—]

Afterwards, on the ^b day of , in the year , the jury between the parties aforesaid is respited here until the ^c day of , unless shall first come on the ^d day of , at , according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear. Therefore let the sheriff have the bodies of the said jurors accordingly.

^b Teste of distringas, or habeas corpora.^c Return day of distringas, or habeas corpora.^d First day of sittings, or commission day of assizes.

[The postea is to be in the usual form.]

No. 3.

Form of Judgment for the Plaintiff in Assumpsit.

[Copy the issue to the end of the award of the venire, and proceed as follows:—]

Afterwards, the jury between the parties is respited until the ^e day of , unless shall first come on the ^f day of , at , according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.

^e Return of distringas, or habeas corpora.^f Day of sittings, or nisi prius.

Afterwards, on the ^g day of , come the parties aforesaid, by their respective attornies aforesaid [or as the case may be], and , before whom the said issue was tried, hath sent hither his record had before him in these words:—

^g Day of signing final judgment.

[Copy postea.]

Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* his said damages, costs, and charges by the jurors aforesaid, in form aforesaid,

1834.

aforesaid assessed, and also *l.* for his costs and charges, by the Court here adjudged of increase to the said *A. B.*, with his assent; which said damages, costs, and charges in the whole amount to *l.*; and the said *C. D.* in mercy, &c.

No. 4.

Form of the Issue, when it is directed to be tried by the Sheriff.

^a Teste of writ
of trial.

After the joinder of issue, proceed as follows: — And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon, on the ^a day of _____, in the year _____, pursuant to the statute in that case made and provided, the sheriff [or, the Judge of _____, being a court of record for the recovery of debt in the said county, as the case may be,] is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly, and when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our Lord the King to him in that behalf directed, with the finding of the jury thereon indorsed, on the day of _____, &c.

No. 5.

Form of Writ of Trial.

William the Fourth, by, &c. To the sheriff of our county of _____ [or, to the Judge of _____, being a court of record for the recovery of debt in our county of _____, as the case may be].

^b Date of first
writ of sum-
mons.

Whereas *A. B.*, in our Court before us at *Westminster* [or, in our Court before our Justices at *Westminster*, or, in our Court before the Barons of our Exchequer at *Westminster*, as the case may be], on the ^b day of _____ last, impleaded *C. D.* in an action on promises [or as the case may be], for that whereas one, &c. [here recite the declaration as in a writ of inquiry], and thereupon he brought suit. And whereas the defendant, on the _____ day of _____ last, by _____, his attorney [or as the case may be], came into our said Court, and said [here recite the pleas and pleadings to the joinder of issue], and the plaintiff did the like. And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*, and it is fitting that the issue above joined should be tried before you the said sheriff of [or, Judge, as the case may be]: We therefore, pursuant to the statute in such case made and provided, command you that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in no wise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly; and

and when the same shall have been tried in manner aforesaid, we command you that you make known to us at *Westminster* [or, to our Justices at *Westminster*; or, to the Barons of our said Exchequer, as the case may be] what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the . . . day of . . . next. Witness . . . , at *Westminster*, the . . . day of . . . , in the . . . year of our reign.

1834.

No. 6.

Form of Indorsement thereon of the Verdict.

Afterwards, on the . . . day of . . . , in the year . . . , ^a Day of trial. before me, sheriff of the county of [or, Judge of the Court of . . . ,] . . . , came, as well the within named plaintiff as the within named defendant, by their respective attornies within named [or as the case may be]; and the jurors of the jury by me duly summoned, as within commanded, also came, and, being duly sworn to try the said issue within mentioned, on their oath said, that . . .

No. 7.

Form of Indorsement thereon, in case a Nonsuit takes place.

[After the words "duly sworn to try the issue within mentioned," proceed as follows:—]
and were ready to give their verdict in that behalf; but the said *A. B.*, being solemnly called, came not, nor did he further prosecute his said suit against the said *C. D.*

No. 8.

Form of Judgment for the Plaintiff after Trial by the Sheriff.

[Copy the issue, and then proceed as follows:—]
Afterwards, on the . . . day of . . . , in the year . . . , came . . . ^b Day of signing judgment. the parties aforesaid, by their respective attornies aforesaid [or as the case may be], and the said sheriff [or, Judge, as the case may be] before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon; which said indorsement is in these words; to wit,

[Copy the indorsement.]

Therefore it is considered, &c. [in the same form as before].

1834.

REGULÆ GENERALES.

Hilary Term, 4 W. 4.

It is ordered, that from and after the first day of *Easter Term* next inclusive, the following rules shall be in force in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, and Courts of Error in the Exchequer Chamber.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea.

Provided that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way.

3. No rule for joinder in demurrer shall be required; but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same; otherwise judgment.

4. To a joinder in demurrer no signature of a sergeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the Court.

6. No motion or rule for a concilium shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument, at the request of either party, with the Clerk of the Rules, in the King's Bench and Exchequer, and a Secondary in the Common Pleas, upon payment of a fee of 1s.; and notice thereof shall be given forthwith by such party to the opposite party.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior Judge of the Court
in

1834.

in which the action is brought; and the defendant shall deliver copies to the other two Judges of the Court next in seniority; and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk of the Rules in the King's Bench and Exchequer, or the Secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

8. Where a defendant shall plead a plea of judgment recovered in another Court, he shall, in the margin of such plea, state the date of such judgment, and, if such judgment shall be in a Court of Record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a Judge.

9. No writ of error shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued.

Provided that, if the error stated in such notice shall appear to be frivolous, the Court, or a Judge upon summons, may order execution to issue.

10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the Clerk of the Errors of the Court in which the judgment is given, and pay the transcript money to him; in default whereof, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros. The Clerk of the Errors shall, after payment of the transcript money, deliver the writ of error, when returnable, with the transcript annexed, to the Clerk of the Errors of the Court of Error.

11. No rule to allege diminution, nor rule to assign errors, nor scire facias quare executionem non, shall be necessary, in order to compel an assignment of errors; but, within eight days after the writ of error, with the transcript annexed, shall have been delivered to the Clerk of the Errors of the Court of Error, or to the Signer of the Writs in the King's Bench, in cases of error to that Court, or within twenty days after the allowance of the writ of error, in cases of error coram nobis, or coram vobis, the plaintiff in error shall assign errors; and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros.

12. The

1834.

12. The assignment of errors, and subsequent pleadings thereon, shall be delivered to the attorney of the opposite party, and not filed with any officer of the Court.

13. No scire facias ad audiendum errores shall be necessary (unless in case of a change of parties); but the plaintiff in error may demand a joinder in error, or plea to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur; otherwise the judgment shall be reversed.

Provided that if, in any case, the time allowed, as hereinbefore mentioned, for getting the transcript prepared and examined for assigning errors, or for delivering a joinder in error or plea or demurrer, shall not have expired before the 10th day of August in any year, the party entitled to such time shall have the like time, for the same purpose, after the 24th day of October, without reckoning any of the days before the 19th of August.

Provided also, that, in all cases such time may be extended by a Judge's order.

Provided also, that in all cases of writs of error, to reverse fines and common recoveries, a scire facias to the terretenants shall issue as heretofore.

14. When issue in law is joined, either party may set down the case for argument with the Clerk of the Errors of the Court of Error, or the Clerk of the Rules in the King's Bench, as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument, in like manner as on a demurrer, without any rule or motion for a non-cum.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench on writs of error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk of the Errors, or the Clerk of the Rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies.

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument; but, after judgment shall have been given in the Court of Errors in the Exchequer Chamber, either
party

1894.

party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the Court below, on a certificate of a Clerk of the Errors of the Exchequer Chamber of the judgment given, for which a fee of 3s. 4d., and no more, shall be charged.

17. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of *Trinity Term*, 1 W. 4. s. 12.

18. It shall not be necessary to repass any *nisi prius* record which shall have been once passed, and upon which the fees of passing shall have been paid. And if it shall be necessary to amend the day of the teste and return of the *distringas* or *habeas corpus*, or of the clause of *nisi prius*, the same may be done by the order of a Judge, obtained on an application *ex parte*.

19. Writs of trial shall be sealed only, and not signed.

20. Either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A, or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a Judge why he should not consent to such admission; or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge, or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided that, if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons, that he does not think it reasonable to require it.

REGULÆ GENERALES, HILARY TERM,

1834.

A Judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and, in the absence of a special order, the costs shall be costs in the cause.

Form of Notice referred to.

A.

In the K. B., }
C. P., } A. B. v. C. D.
or Exchequer.

Take notice, that the { plaintiff
defendant } in the cause proposes to adduce
in evidence the several documents hereunder specified, and that the same
may be inspected by the { defendant,
plaintiff, } his attorney or agent, at
, on , between the hours of ; and that the
{ defendant
plaintiff } will be required to admit that such of the said documents
as are specified to be originals were respectively written, signed, or ex-
ecuted as they purport respectively to have been; that such as are spe-
cified as copies, are true copies; and such documents as are stated to have
been served, sent, or delivered, were so served, sent, or delivered respec-
tively; saving all just exceptions to the admissibility of all such docu-
ments as evidence in this cause. Dated, &c.

G. H., attorney for { plaintiff.
defendant. }

To E. F., attorney or agent for { defendant.
plaintiff. }

[Here describe the documents; the manner of doing which may be as follows:—]

Originals.

| Description of the Documents. | Date. |
|----------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| Deed of covenant between A. B. and C. D. first part, and E. F. second part - - - - - | 1st Jan. 1828. |
| Indenture of lease from A. B. to C. D. - - - - - | 1st Feb. 1828. |
| Indenture of release between A. B. and C. D. first part, &c. - - - - - | 2d Feb. 1828. |
| Letter, defendant to plaintiff - - - - - | 1st March 1828. |
| Policy of insurance on goods by ship <i>Isabella</i> , on voy- age from <i>Oporto</i> to <i>London</i> - - - - - | 3d Dec. 1827. |
| Memorandum of agreement between C. D., captain of said ship, and E. F. - - - - - | 1st Jan. 1828. |
| Bill of exchange for 100 <i>l.</i> , at three months, drawn by A. B. on, and accepted by, C. D., indorsed by E. F. and G. H. - - - - - | 1st May 1829. |

Copies.

Copies.

1834.

| Description of Documents. | Date. | Original or Duplicate served, sent, or delivered, when, how, and by whom. |
|------------------------------------------------------------------------------------------|------------------------|---------------------------------------------------------------------------|
| Register of baptism of <i>A. B.</i> in the parish of <i>X.</i> - - } | 1st Jan. 1808. | |
| Letter, plaintiff to defendant - | 1st Feb. 1828. - | { Sent by General Post, 2d Feb. 1828. |
| Notice to produce papers - | 1st March 1828. | { Served 2d March 1828, on defendant's attorney, by <i>E. F.</i> of |
| Record of a judgment of the Court of King's Bench, in an action, <i>J. S. v. J. N.</i> } | Trinity term, 10 G. 4. | |
| Letters patent of King <i>Charles</i> II. in the Rolls' Chapel - } | 1st Jan. 1680. | |

HILARY VACATION.

DIRECTIONS to taxing Officers as to all Writs issued on or after the 15th *March* 1834.

IN all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into Court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* without costs, the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed. Provided that in case of trial before a judge of one of the superior courts, or judge of assize, if the judge shall certify on the posted that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale.

At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of 20*l.* or not, in the following form: —

“ Debt above 20*l.* ”

“ Debt 20*l.* or under. ”

The Officers of the Exchequer to allow no incipiturs of judgment on paper, and mark the judgment on the posted.

Three shillings and four-pence to be allowed for drawing the judgment in all cases.

Every brief sheet to contain eight folios at the least, which are to be paid for at the rate of 6*s.* 8*d.* per sheet for drawing, and 3*s.* 4*d.* copying.

For every witness the allowance for travelling to be the expense actually paid, not exceeding 1*s.* a mile, unless under special circumstances.

REGULÆ GENERALES, HILARY VACATION,

1834]

No fees to counsel to be allowed on writs of trial, except in trials before the judge of the Sheriff's Court of London, or of other courts of record, where attorneys are not allowed to practice, and then 1 guinea only.

The FEES to be allowed to Counsel's Clerks not to exceed as under

| | | |
|-----------------------------------------------------|---|--------|
| Upon a Fee under 10 guineas | - | 0 2 6 |
| Ten guineas and under 20 guineas | - | 0 5 0 |
| Twenty guineas and upwards | - | 0 10 0 |
| Senior Counsel's Clerks or Combination | - | 0 7 6 |
| The other Counsel's Clerks, each | - | 0 12 6 |
| Attending as a Witness at trials to prove Documents | - | 0 10 6 |

SCHEDULE I.

Commencement of Cause

| | | |
|---------------------------------------------------------|---|-------|
| Matter before Action (if sent) | - | 0 3 0 |
| Instructions to sue | - | 0 3 0 |
| Writ | - | 0 3 0 |
| Copy and Service | - | 0 3 0 |
| Bill and Copy to indorse | - | 0 3 0 |
| Searching for Appearance | - | 0 3 4 |
| Instructions for Declaration | - | 0 3 4 |
| Drawing same at 1s. per folio (folio 6) | - | 0 6 0 |
| Engrossing | - | 0 2 0 |
| Notice thereof (when filed) | - | 0 5 0 |
| Drawing Particulars and Copy | - | 0 2 6 |
| Rule to plead | - | 0 1 0 |
| Demanding Plea | - | 0 3 0 |
| Drawing Issue, of whatever length | - | 0 3 4 |
| Ingrossing Issue to deliver at 4d. per folio (20 folio) | - | 0 3 4 |
| Notice of trial | - | 0 2 0 |

SCHEDULE II.

When the Cause is tried before the Sheriff.

| | | |
|-----------------------------------------|---|-------|
| Summons for Trial | - | 0 3 0 |
| Copy and Service | - | 0 3 0 |
| Attending for Order | - | 0 8 4 |
| Paid Order | - | 0 1 0 |
| Copy and Service | - | 0 3 0 |
| Ingrossing the Writ of Trial (folio 14) | - | 0 4 8 |
| Parchment | - | 0 3 0 |
| Paid Sealing | - | 0 1 7 |
| Attending thereon | - | 0 3 4 |
| Copy Particulars, to annex | - | 0 1 0 |
| Subpoena | - | 0 5 0 |

Copy

1884

| | |
|------------------------------------------------------------------------------------------------------------------|--------|
| Copy and Service | 0 3 0 |
| Making Minutes of Evidence for the hearing | 0 13 4 |
| Attending to enter the Cause | 0 3 4 |
| Paid part of the Sheriff's Fee on leaving the same (No more to be paid if the Record be withdrawn before Trial.) | 0 4 0 |
| Attending Court on Trial | 0 13 4 |
| Paid rest of Fees of Trial | 4 4 6 |
| Notice of taxing | 0 3 0 |
| Affidavit of Increase | 0 5 0 |
| Paid filing Affidavit (whether Township or Country) | 0 4 0 |
| Bill of Costs and Copies | 0 4 0 |
| Attending taxing | 0 3 4 |
| Paid taxing (in K. B. and Exchequer) | 0 2 6 |
| Drawing Judgment | 0 3 4 |
| Entering on Roll at 4d. per folio | - |
| Paid Roll | 0 14 0 |
| Paid Entries (as before) | - |
| Paid Judgment Fee and Docket (as before) | - |
| Attending thereon | 0 3 0 |
| Term Fee | 0 10 0 |
| Letters in Country Cause. | - |
| Under 50 miles | 0 2 0 |
| Above 50 miles | 0 4 0 |
| Above 100 miles | 0 6 0 |
| Where Fi. Fa. and Warrants thereon, viz. | - |
| In Town | 0 8 0 |
| In Country | 0 13 0 |
| SCHEDULE III. | - |
| Where Cause is tried at Nisi Prius, and Verdict for 20l. or under. | - |

| | |
|----------------------------|--------|
| Ingressing Record (Fo. 14) | 0 4 8 |
| Parchment | 0 3 0 |
| Paid Sealing | 0 0 7 |
| Attending thereon | 0 3 4 |
| Copy Particulars to annex | 0 2 0 |
| Vesire | 0 5 6 |
| Paid return | 0 2 0 |
| Attending thereon | 0 3 4 |
| Distingas | 0 7 6 |
| Paid return (about) | 0 15 0 |
| Attending thereon | 0 3 4 |
| Subpoena | 0 5 0 |
| Copy and Service | 0 3 0 |

Instructions

1894.

| | £ | s | d. |
|-----------------------------------------------------|---|---|--------|
| Instructions for Brief | - | - | 0 13 4 |
| Brief and Copy (and no more) | - | - | 2 0 0 |
| Attending to enter Cause | - | - | 0 3 4 |
| Paid entering (about) | - | - | 0 18 0 |
| Counsel (as usual) | | | |
| Attending Court on Trial | - | - | 1 1 0 |
| Paid fees on Trial (about) | - | - | 3 15 0 |
| Postea | - | - | 0 5 0 |
| Notice of taxing | - | - | 0 3 0 |
| Affidavit of Increase | - | - | 0 5 0 |
| Paid filing same | - | - | 0 1 0 |
| Bill of Costs and Copy | - | - | 0 4 0 |
| Attending taxing | - | - | 0 3 4 |
| Paid taxing, (in K. B.' and Exchequer) as usual say | - | - | 0 4 0 |
| Drawing Judgment | - | - | 0 3 4 |
| Entering on Roll at 4d. about 19 Fo. | | | |
| Paid Roll | - | - | 0 0 10 |
| Paid Judgment Fee and Docket | | | |
| Attending thereon | - | - | 0 3 4 |
| Term Fee | - | - | 0 10 0 |

Letters in Country (as to distance).

Costs not to be taxed until Judgment signed, unless the parties compromise without Judgment.

Where Fi. Fa. and Warrant (as before)

(Signed)

T. D.

S. G.

N. C. T.

J. B. B.

L.

J. V.

J. B.

W. B.

J. A. P.

E. H. A.

J. L.

J. G.

J. P.

Rule Office, K. B.

6. *Symond's Inn.*

AN
INDEX
TO THE
PRINCIPAL MATTERS.

**ABUTTALS, DESCRIPTION OF,
IN LEASE.**

See LEASE, 1.

ACTION.

See PARTNERSHIP, 1, 2.

**ACTION, COMMENCEMENT
OF.**

See INCLOSURE ACT, 1.

ACTION ON THE CASE.

1. *A.* erected a mill in 1823 on his own land, the former owner of which had for twenty years before 1818 appropriated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818, *B.* had erected a mill near the same stream, and the owner and occupier of *A.*'s land then gave a parol licence to *B.* to make a dam at a particular spot, and take what water he pleased from that point, which water was so
VOL. V.

taken, and returned by pipes into the stream above the spot where *A.*'s mill was afterwards erected. In 1818 *B.*, without licence, conveyed part of the water which had before flowed into the stream from certain springs, into a reservoir for the use of his mill. In 1828, *A.* appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829, *A.* demolished the dam erected by *B.*, and gave him notice not to divert the water. *B.* then erected a new dam lower down the stream, and by means of it diverted from *A.*'s mills, at some times, all the water before appropriated by *A.*; at others, a part of it; and the water when returned into the stream, was in a heated state: Held, on special verdict,

First, that whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, was entitled to the surplus water; for he was first occupant of that, and also owner and occupier of the
c the

the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling of such surplus water.

Secondly, that *A.* was in like manner entitled to recover in respect of the water diverted by *B.* at his new dam; because the licence granted to *B.* by the former occupier was, to take the water at one particular point, and not at the place where his dam was made; and further, because if the licence had been general to take at any place, it would have been revocable, except as to such places where it had been acted on, and expence incurred; and it was revoked before the last dam was erected.

Thirdly, that *A.* was entitled to recover for the water diverted from the springs, and collected in a reservoir in 1818: for the possessor of land through which a natural stream flows, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty years' enjoyment.

Whether such possessor of land can maintain an action for the mere violation of such general right by diversion of the water, &c., without having sustained any special injury, *Quære. Mason v. Hill, T. 3 W. 4.*

Page 1

2. An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue.

The owners of a ship circulated advertisements of sale, beginning with a description of the ship,

which stated her to be copper-fastened; after which was a notice, that the hull, masts, yards, and rigging, were to be taken with all faults. Under this was printed the word "Inventory," which was followed by a list of the ship's stores and tackle; and there was then a further announcement, that the vessel and her stores were to be taken with all faults, and without allowance for weight, length, quality, quantity, or any defect whatever. The owners afterwards executed a written contract of sale, not stating the vessel to be copper-fastened, but containing this clause: "On payment of the purchase money, the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited; but the said inventory shall be made good as to quantity only; and the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever."

Held, (assuming that the advertisement could, by words of reference, be incorporated with the contract of sale,) that the word "inventory" in the contract, referred only to the list of stores, &c. and not to the prior part of the advertisement: and, therefore, that on the two documents taken together, no warranty appeared that the ship was copper fastened. *Freeman v. Baker and another, M. 4 W. 4.*

Page 797

ADMINISTRATION.

See SETTLEMENT BY RENTING A TENEMENT, 1.

ADMIT-

APPEAL.

ADMITTANCE.

See COPYHOLD, 2, 3.

ADOPTION OF ROAD BY PARISH.

See HIGHWAY.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 12.

AGREEMENT.

See PLEADING, 5. 7. PRACTICE, 7.

ALDERMAN.

See MANDAMUS, 1.

AMENDMENT.

See PLEADING, 1.

ANNUITY.

See DEVISE, 2. JUDGMENT.

APPEAL.

See MANDAMUS, 3, 4. 7. SESSIONS.

The parish of *Bishop Wearmouth* has no overseers of the poor; but contains several townships, separately maintaining their own poor, and having distinct overseers. Two of these townships are called *Bishop Wearmouth* and *Bishop Wearmouth Panns*. Paupers, whose settlement was in *Bishop Wearmouth Panns*, were, by an order of justices, directed to be removed to the parish of *Bishop Wearmouth*. The order was served on the overseer of *Bishop Wearmouth Panns*, who refused to receive the paupers (on the ground that that township was not named in the order) unless certain expences were waived.

ARBITRAMENT.

XXV

This being refused, the paupers were taken away. The removing parish afterwards served the churchwarden of the whole parish of *Bishop Wearmouth* with the order, and delivered the paupers to him. The latter took the paupers to the workhouse of *Bishop Wearmouth* township, where they were maintained:

Held by *Denman C. J.* and *Littledale J.*, *Taunton* and *Patterson Js.*, dubitantibus, that the inhabitants of the township of *Bishop Wearmouth*, although they were not bound to maintain the pauper under the order, had reasonable ground for thinking that they might be aggrieved by it, and therefore were entitled to appeal. *The King v. The Inhabitants of Bishop Wearmouth*, H. 4 W. 4. Page 942

APPORTIONMENT OF RENT.

See LEASE, 2.

APPURTENANCES.

See WAY.

ARBITRAMENT.

See STOPPAGE IN TRANSITU, 2.

1. A replevin suit, and all matters in difference touching the distress, were referred to arbitration; the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed:

Held, that the award did not shew who ought to pay the costs, which were to abide the event of
c 2 the

the suit; and, consequently, that it was not final. *In the matter of Arbitration between Leeming and Fearnley, T. 3 W. 4. Page 403*

2. A party to an arbitration cannot object to the award, that the arbitrators chose an umpire by lot, if he expressly agreed to, or acquiesced in, that mode of choice.

Where a submission to arbitration under seal, has been varied by indorsing on it a new agreement (as, for changing one of the arbitrators,) to which both the principal parties have expressly assented, one of those parties cannot afterwards move to have the award set aside on the ground that the indorsement was not under seal.

An umpire, being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was in question, made his award without calling for further evidence, or giving any notice on that subject to the parties: Held, that the award could not be objected to on that ground by a party who knew that the case had gone before the umpire, and made no application to him to hear further evidence.

In the matter of Arbitration between Tunno and Bird, M. 4. W. 4.

488

3. On a reference of a cause and all matters in difference by a Judge's order, one of the parties moved, after the proper time, to set the award aside: Held, no excuse for the delay, that the arbitrator made an exorbitant charge for the award, in consequence of which the party now applying did not take it up.

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges; whether they be reasonable or not. *Macarthur v. Campbell, M. 4. W. 4.*

518

4. No precise form of words is necessary to constitute an award; it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. But where an arbitrator, to whom a dispute between an architect and his clerk, respecting a claim by the latter to wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not shew experience or ability to the extent to justify a demand for remuneration under the circumstances; but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10*l.*:

Held that the latter part of the letter was a mere suggestion of the arbitrator and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and therefore not a good award. *Lock v. Pulliamy, M. 4. W. 4. Page 600*

ARREST.

1. By the 32 G. 2. c. 28. s. 1., it is enacted that no sheriff's officer shall carry any person arrested by him to gaol within twenty-four hours from the time of such arrest, unless such person shall refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment; and by s. 12. a penalty is imposed on any officer offending against the act:

Held, in an action brought for the penalty, for taking a party to gaol within twenty-four hours, contrary to the statute, that the officer who made the arrest ought to have required the party arrested to nominate some convenient dwelling-house to be taken to; for the latter

latter could not be said to have refused till the proposal had been made, and a mere omission by him to nominate a place did not justify carrying him immediately to gaol. *Simpson v. Renton*, T. 3 W. 4. Page 35

2. Plaintiffs having obtained a verdict against defendant under an award, in a cause in K. B., the Court of Chancery, upon bill filed, and matter appearing on the award itself, granted an injunction to stay further proceedings. Plaintiffs nevertheless signed judgment, and took defendant in execution. On application to this court for a rule nisi to discharge the defendant out of custody, (it being stated amongst other things, that the plaintiffs could not be met with for the purpose of attaching them by process out of Chancery,) this Court refused to interfere. *Foreman & Lloyd v. Jeyes*, M. 4 W. 4.

835

3. A person having made a motion in a cause to which he was a party, left the court, and in his way home called at an office where he kept his papers, but did not reside, to refresh himself and sort his papers: he remained there between one and two hours, and then left the office, and went into a tailor's shop in the same street, intending, however, to proceed home immediately, and being on his way thither when he so deviated. As soon as he entered the shop, he was arrested by a sheriff's officer, who had watched him from the court:

Held that the privilege of the party, redeundo from the court, had not ceased when he was arrested, and that he was entitled to be discharged. *Pitt v. Coomes*, H. 4 W. 4.

1079

ASSUMPSIT.

See LIEN.

1. Defendant was office-keeper of an Exeter and London coach, and servant to C., a proprietor at Exeter, where the office kept by the defendant was. Defendant from time to time made up accounts of the shares of profits due to the several proprietors, and sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion defendant sent to plaintiff, a proprietor, a packet purporting to contain 29*l.*, which was due to him, but in reality containing 20*l.* only. Plaintiff sued defendant for 3*l.* had and received to his use:

Held that defendant was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from this defence by having told the plaintiff (after action brought) that he, defendant, had had the 29*l.* of C. and sent it to the plaintiff, and debited C. with it. *Howell v. Batt*, M. 4 W. 4.

Page 504

2. A brewer, who delivered beer to be used in a particular public-house on the credit of a person, not the licensed keeper of the house, may maintain an action against the latter for goods sold and delivered. *Brooker v. Wood*, H. 4 W. 4. 1052

ATTAINDER OF FELONY.

See EJECTMENT, 1. LEASE 6.

ATTORNEY.

See EVIDENCE, 3. LIEN. PRACTICE, 11.

1. Where an attorney, defendant in assumpsit, sets off the amount of his

c 3

his bill, the plaintiff cannot deduct from that set off costs of taxation allowed against the attorney, pursuant to 2 G. 4. c. 23. s. 23. *Field v. Bezant Gt. one, &c., T. 3 W. 4.*

Page 357

2. The Court of King's Bench does not exercise any common law jurisdiction in taxing attorneys' bills.

The court, in the exercise of its statutory jurisdiction, refused to order an attorney's bill to be taxed at the instance of a third person, where the client had before admitted the amount to be due and declined taxing the bill; such client having since become bankrupt, and the application being made for the purpose of reducing his claim so as to prevent his being a good petitioning creditor. *Clutterbuck v. Combes, T. 3 W. 4.*

400

3. The Court of King's Bench will not grant a rule calling on an attorney to shew cause why he should not be struck off the roll, if the affidavits in support off the rule state an offence for which he would be liable to indictment. *Anonymous H. 4 W. 4.* 1089

AWARD.

See ARBITRAMENT, 1, 2, 3, 4.

BAIL.

See PRACTICE, 2.

BANKER.

1. *V.* and Co. bankers, were assignees of a judgment obtained in *Scotland* against *M. H.* for 4100*l.* In 1829 *M. H.* deposited with *V.* and Co. 4100*l.*, and by a memorandum in writing it was agreed that that sum should be deposited in their hands for safe custody, on

account of *M. H.*, and that *from the time such deposit should be made and during its continuance V.* and Co. were not to pay any interest thereon, and all interest should cease in respect of the amount due upon the judgment. *M. H.* afterwards became bankrupt, and his assignees on the 12th of *Nov.* 1831, demanded from *V.* and Co. the 4100*l.*, which they refused to pay: Held, that they were not liable to pay interest on that sum from the time when payment of the principal was demanded. *Edwards v. Vere, T. 3 W. 4.* Page 282

2. Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money unless he prove distinctly that the loan was in reality intended to be his and was received as such. And therefore where *A.* as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the *East India* Company, to pay to the said owners or bearer the sum of money therein mentioned, for freight; and *A.* deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it on account: it was held on assumption brought after *A.*'s death by the surviving part owners against the bankers, that on proof of the above facts, they could not recover the money because it was not shewn that the loan was upon their account, for the fact of the warrants being the property of all the part owners, when placed in the bankers' hands was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was *A.*'s loan. *Sims v. Bond and another, T. 3 W. 4.*

389

BANK-

BANKRUPT.

See STOPPAGE IN TRANSITU, 2.

1. A steam engine erected for the purpose of working a colliery to be used by the lessee of such colliery during his term, but to be held as the property of the landlord subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels," in the 6 G. 4. c. 16. s. 72. nor had the bankrupt the actual or apparent ownership. *Coombs and another v. Beaumont*, T. 3 W. 4. Page 72
2. A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must shew, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. *Morgan v. Brundrett, Gt. one, &c.* T. 3 W. 4. 289
3. R. C. borrowed a sum of money and gave the lenders a bond, by which he and four others bound themselves jointly and severally in a penalty, for the regular payment of interest, and for the discharge of the principal, and all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of R. C. became bankrupt, and obtained his certificate. At the time of the bankruptcy, a forfeiture had accrued by non-payment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate, R. C. was called upon for the principal but did not pay, and payment was enforced from the four co-obligors who had continued solvent. In an action by

one of them against the party who had been bankrupt for contribution: Held that they could not have proved under the commission by s. 52. of the bankrupt act, and, therefore, that the certificate was no answer to the action. *Clements v. Langley*, T. 3 W. 4.

Page 372

4. The bankrupt act, 6 G. 4. c. 16. s. 72., vests in the assignees such goods whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of A. until the day before he became bankrupt, and then demanded the possession of them, which A. refused to deliver: Held, that they did not pass to A.'s assignees. *Smith v. Topping*, M. 4 W. 4.

674

BARON AND FEME.

See FEME COVERT.

BEER, SALE OF, BY RETAIL.

See CUSTOM, 1.

BILL OF EXCHANGE.

See STAMP, 1.

1. In an action by drawer against acceptor of a bill of exchange for 101*l*. defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in the defendant's handwriting, purporting by its date to have been written after he came of age, addressed to a third person in these words: "I request you pay to H." (plaintiff) "101*l*. at your earliest convenience, after the date of this letter, from the money left me by my late grandfather, for which I have given my bill."

c 4

This

This letter was proved to have been delivered to the plaintiff's clerk, but it did not appear when. Held, that the letter must, *prima facie*, be taken to have been written and issued at the time when it bore date; and that having been written after defendant came of age, and before the bill became due, it would support a count on a promise to pay according to the tenor and effect of the bill. *Hunt v. Massey*, H. 4 W. 4. Page 902

2. In an action by the indorsee against the drawer of an accommodation bill, which had been fraudulently disposed of by the first indorsee, and afterwards discounted by the plaintiff, it is no defence that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained: the defendant must show that the plaintiff was guilty of gross negligence. *Crook v. Jadis*, H. 4 W. 4. Page 909

3. To an action by an indorsee against the indorser of a bill of exchange who had lost the bill by accident it is a good defence that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the party from whom he took it had no title, or that he was guilty of gross negligence in taking it; but it is no defence that he took it under such circumstances that a prudent cautious man would not have taken it. *Backhouse v. Harrison*, H. 4 W. 4. 1099

BILL OF LADING.

See FREIGHT. STOPPAGE IN TRANSITU, 2.

BILL OF MIDDLESEX.

See PRACTICE, 6.

BOND.

1. On a bond with a penalty, conditioned for the payment of money at a given day, and interest in the mean time, with a stipulation that on any default in paying the interest, the whole sum should be demandable; the obligee, on the interest falling into arrear, brought an action to recover the whole principal and interest: Held, that the case was not within 8 and 9 W. 3. c. 11. s. 8., and therefore that the plaintiff was entitled after verdict to have judgment and execution for the whole principal sum, and not merely for the arrears of interest. *James v. Thomas*, T. 3 W. 4. Page 40

2. An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made. *Gibbs v. Southam*, H. 4 W. 4. 911

3. Debt on bond. The condition, after reciting that the obligor was about to marry with A. a widow, and thereby to become possessed of a stock in trade, and that it was agreed that he should execute a bond to pay to the children of A. by her late husband 300*l.* within twelve months after her death in the event thereafter specified, was that, "if the obligor should within twelve months after the decease of A. pay to her children 300*l.*, if, upon an account taken, the stock in trade and effects in the business (if then carried on by the obligor) should amount to 400*l.*; but in case upon such account to be taken, the stock in trade should amount to less than 400*l.*, then if if the obligor should pay to the children of A. 120*l.*, the bond should be void."

Plea, that long before the death of A., the obligor retired from and ceased

ceased to carry on the trade, and that at the death of *A.* he had not any stock in trade, and that no account of the said stock in trade in the condition mentioned was or could be taken at the time of the death of *A.*, or from thence hitherto: Held on demurrer that the true construction of the condition of the bond was, that the obligor had an option to continue or discontinue the trade during the life of *A.*; and that he having discontinued it, the event on which the money was to come to the children of *A.* had never happened; and that the plea therefore was good. *Berwick v. Spindells*, *H. 4 W. 4.* Page 914

BREWER.

See ASSUMPSIT, 2.

BRIDGE.

Before the statute 43 *G. 3. c. 59.* there had been a public county bridge, which was of wood, resting on stone abutments. After that statute passed, the wooden part of the bridge was, during a flood, carried some distance down the river, but the stone abutments remained. Part of the wooden materials being afterwards collected together, were, with new materials formed into the upper part of a bridge, which was wider than it had been before the flood, and placed upon the old abutments. This was done at the expence of the parish, and not under the direction of the county surveyor: Held, that this was not a bridge erected or built after the passing of 43 *G. 3. c. 59. s. 5.*; and that the inhabitants of the county were bound to repair it. *The King v. The Inhabitants of the County of Devon*, *T. 3 W. 4.* 883

BROKER.

See INSURANCE BROKER.

BUILDING.

See INDICTMENT, 3.

BURGESS.

See CUSTOM, 1, 2.

BUTTER, SALE OF.

See VENDOR AND VENDEE, 1.

CANAL ACT.

1. By acts of parliament, enabling a company to make and maintain a canal navigation, and to take lands for that purpose making satisfaction, it was provided that the company should not take any garden ground without consent of the respective owners and occupiers, and that any action to be brought for any thing done in pursuance of those acts, should be commenced within six calendar months next after the fact should have been committed; or if there should be a continuance of damages, then within six calendar months next after the committing of such damage should have ceased.

The company wishing to take garden ground for the purpose of sloping the banks of the canal, told the occupier, or tenant, that they had obtained the consent of the owner's agent, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land in consequence was from thence-

thenceforth overflowed by the *Thames* at every high tide. For this damage the landlord sued the company more than six calendar months after the ground was taken, and the tide was let in :

Held, that the injury was one for which an action should have been brought within six months from the taking away of the land ; and that the defendants were within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statutes, though in the prosecution of that purpose the defendants had been guilty of a misrepresentation and of bad faith towards the occupier. *Lord Oakley v. The Kensington Canal Company, T. 3 W. 4.*

Page 138

2. A river navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person seised in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls to a trustee, to secure the annuities, and to permit her to hold the conveyed premises and the profits thereof to her own use, till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to Y. together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation ; and out of the several receipts and profits to defray *the costs and expenses necessary for carrying the trusts into effect*, to pay up, and if possible discharge the annuities, to pay off certain creditors and to hold the surplus, if any, for her benefit.

The trustee under the last mentioned deed entered into receipt of the tolls, appointed a collector

and represented himself to the commissioners as a mortgagee of the tolls, and as having a control over them and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary :

Held, that it lay upon the trustee having conducted himself as above stated, to shew that he was not a proprietor within the meaning of the act : Held further on on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee, to secure the annuities.

The act, passed in 1794, required that certain notices should be given in the *Northampton* and *Cambridge* newspapers. There was at that time one newspaper published at each place. A newspaper was subsequently established called *The Huntingdon, Bedford, and Peterborough Gazette, and Cambridge and Hertford Independent Press* ; and it was published (among other places) at *Cambridge* : Held, that publication of the notices in the former papers was sufficient. *Tibbitts, Gent. One, &c. v. Yorke, M. 4 W. 4.* Page 605

CAPIAS.

See PRACTICE, 12.

CERTIFICATE.

See BANKRUPT, 3.

CERTIORARI.

See INDICTMENT, 1. SESSIONS.

CHELSEA

CHELSEA WATER WORKS' COMPANY.

See POOR RATE.

CLERK TO COMMISSIONERS OF NAVIGABLE CANAL.

See CANAL ACT, 2.

CLERK TO TRUSTEES UNDER A TURNPIKE ACT.

See MANDAMUS, 2.

CLOSES IN WHICH, &c.

See PLEADING, 3.

COAL MINES, RATEABILITY OF.

See INCLOSURE ACT, 2.

COMMENCEMENT OF RISK.

See INSURANCE, 2.

CONDITION.

See BOND, 1, 2, 3.

CONDITION PRECEDENT.

See LEASE, 3.

CONVICTION.

See JUSTICES, 1.

COPARCENER.

See LIVERY OF SEISIN.

COPYHOLD.

1. Copyholds are within the statute 27 *Eliz. c. 4.* which avoids all conveyances of any lands, tenements, or hereditaments, made for the intent and of purpose to defraud and deceive persons that shall afterwards purchase the same. *Doe d. Tunstall v. Bottrill, T. 3 W. 4.* Page 131
2. A copyholder in fee surrendered to the use of another person and afterwards and before the admittance of the surrenderee, committed and was convicted of simple felony: there being a custom in the manor that any tenant of customary tenements who should commit and be convicted of felony, should forfeit his said tenements to the lord: Held, that the surrenderor before admittance was still tenant for the purpose of forfeiture, and that his estate was forfeited to the lord, and the surrenderee not entitled to be admitted. *The King v. Lady Jane St. John Mildmay, T. 3 W. 4.* 254
3. At a court baron, held in 1812, before the steward of a manor, two copyhold tenements were granted to *W. R.* and *J. H.*, habendum for their lives and the life of the longest liver of them successively at the will of the lord according to the custom of the manor, at the yearly rents of 26s. 4d. and 7s. all services therefore due, and a heriot when it should happen, and the said *W. R.* was admitted tenant; but the admission and fealty of *J. H.* were respited until, &c.
In 1823 the lessees of the manor by deed appointed *C. L.* steward of the manor, with full power to hold courts baron and customary courts, and to do all acts usual to be done by stewards in relation there-

thereunto; and they more especially authorised him to make any voluntary grants of customary or copyhold lands within or parcel of the manor, and to give licences to demise, or otherwise, as he the said *C. L.* should think fit, and either in or out of court as fully as the lessees might or could do.

At a court baron held out of the manor in 1825, *J. H.* (who survived *W. R.*) surrendered to the lords lessees the above mentioned copyhold messuages, and the lessees by *C. L.* their steward granted them again to *W. H. L.* and *J. W. W.* habendum for their lives, and the life of the longest liver of them successively, according to the custom of the manor, at the yearly rent of 26s. 4d. and 7s. and all services therefore due, and a heriot for each of the said tenements when it should happen, according to the custom of the manor; and *J. H. L.* and *J. W. W.* were admitted tenants:

Held, that it was no objection to this grant that *J. H.* the surviving life under the grant of 1812 was never admitted tenant: nor that two rents were reserved, without distinguishing how much was payable for each tenement the same rents having been reserved by a former grant in 1771: nor that a heriot was reserved for each tenement when it should happen, according to the custom of the manor; for if a heriot was not demandable for each tenement, the claim could not be enforced; but that would not avoid the grant:

Held, secondly, that a customary court cannot be held out of the manor unless there be a custom to warrant it; and if one be held out of it without such custom, it is void, and such things there done, as are required to be done at a court, such as presentments by the homage, imposing fines, levy-

ing fines, and suffering recoveries, are void:

But thirdly, that as the lord may grant to or admit a copyhold tenant, not only out of court, but also out of the manor, the grant of 1825, if it had been made by the lord, would have been good, though it purported to have been made at a void court:

Held, fourthly, that a steward cannot in his mere character of steward admit a copyhold tenant out of the manor.

Fifthly, that as *C. L.* by the deed of 1825 had a special authority to make any voluntary grants, either in or out of court, as fully as the lessees of the manor could do, he might take the surrender, and make the grant in question out of the manor; and that although he professed in making the grant, to act only as steward and not as the special agent of the lord, the grant so made might operate as a grant made by the lord's attorney, and was therefore valid.

Sixthly, that although, in general, to make a party tenant by copy of court roll, his admission ought to be notified, for the information of the tenants, at the next or some other court, and a regular entry of it made by certificate, presentment, &c.; yet, as the proceedings at this void court were entered by the steward on the court rolls, as if done at a valid court, the tenants must, at a following court, after the admittance, have had information of what had been done, and that was sufficient. *Doe dem. Leach and Another v. Whitaker*, T. 3 W. 4.

Page 409

4. If a copyholder pull down a barn, without any intention of rebuilding, the lord cannot recover the place from him, on the ground of a forfeiture, if the jury find that the premises are not damaged.

Doe

Doe dem. Grubb v. The Earl of Burlington, M. 4 W. 4. Page 507
 5. A. and B. by a settlement made on occasion of their intended marriage (which afterwards took place) conveyed certain freehold estates to trustees, for the benefit of themselves and the survivor of them for life, then for the benefit of the issue of the marriage, if any, and if none, then to the use of such person as the wife by deed or last will, *notwithstanding her coverture, and as if she was sole and unmarried*, should appoint, and in default of appointment to the use of herself in fee. The wife at the time of the marriage was seised in tail of certain copyhold lands.

The husband and wife afterwards executed a power of attorney to C., authorising him to surrender the copyhold lands of which the wife was seised in tail to a third person, in order to make him tenant to the præcipe or plaint in a recovery intended to be suffered in the manor court. The wife, previous to her executing the power of attorney, was examined apart from her husband, by the deputy steward of the manor. The recovery was suffered, and immediately afterwards the premises were surrendered to the same uses as those mentioned in the marriage settlement: Held, that the power of attorney was valid as the act of the husband; he having sufficient interest in his wife's copyhold lands to pass them by surrender during the joint lives of himself and his wife; and that the recovery (which had stood unreversed for twenty years) was therefore well suffered.

After the above surrender, the wife was admitted to other copyhold lands, which were not surrendered to the use of her will. By her will, made in 1802, she devised her real and leasehold

estates to certain persons therein named. At the date of her will and of her death she was seised of freehold estates: Held, that the will was a valid disposition of the copyhold which had been surrendered to the use of her will, though it did not refer to the surrender in which the right of disposition was reserved, and though it was made after she ceased to be a feme covert:

Held further, that the copyholds which had not been surrendered to the use of the will, did not pass by the general devise of the real estate, the will having been made before the 55 G. 3. c. 192. *Doe dem. Smith v. Bird and Another, M. 4 W. 4. Page 695*

CORONERS.

The court on the application of the crown, set aside a coroner's inquisition, for defects apparent on the face of it. Rule absolute in the first instance. *In the Matter of Culley, T. 3 W. 4. 230*

CORPORATE OFFICER.

See MANDAMUS.

CORPORATION.

See QUO WARRANTO.

In an action against a corporation on a bond, the condition of which recited, that the company were, by act of parliament, authorised to raise money by bond, and that at a general assembly of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded *non est factum*: Held, that although the company could not, under that plea, shew that the bond executed

by

by them was invalidated by collateral matters, they might shew that it was void, because it was executed contrary to the provisions of the act of parliament:

Held, secondly, that a clause in the act of parliament, whereby the company were authorised, at any general or special general assembly, to order and dispose of the custody of their common seal, and the use and application thereof, empowered them to make rules and regulations for its custody, but did not require their concurrence in each particular act of sealing, and that a bond to which the seal had been affixed by the company's clerk, under a general authority from the directors, was valid.

By another clause it was enacted, that the clerk should, in a book provided by the company, keep an account of all acts, proceedings, and transactions of the company of proprietors, and that every proprietor should have liberty to inspect the same, and take copies of the entries: Held, that entries of the proceedings in the book so kept by the clerk were not admissible in evidence, against one of their own members suing them. *Hill v. The Manchester and Salford Water Works' Company*, M. 4 W. 4. Page 866

COSTS.

See ATTORNEY, 1, 2. EJECTMENT, 2, 3. INDICTMENT, 2. MANDAMUS, 8. PRACTICE, 5, 7, 8, 12. PROHIBITION, 1. SLANDER, 2.

CO-SURETY.

See BANKRUPT, 3.

COURT.

See COPYHOLD, 3.

COURT MARTIAL.

See PROHIBITION, 2.

COVENANT.

See LEASE, 3. 5. PLEADING, 5.

Declaration stated that by indenture between defendant and *J. W.*, reciting that defendant for certain considerations had agreed to pay off certain mortgages and debts of *J. W.*, defendant covenanted to and with *J. W.* to save, protect, defend, keep harmless, and indemnify *J. W.* his heirs, executors, administrators, &c., from the payment of the said debts, and from all actions, &c. in respect of them. Breach, that 500*l.* of an annuity for payment of which *J. W.* had bound himself, his heirs, executors, and administrators, became in arrear, and remained so after *J. W.*'s death, and that defendant did not pay the same, nor protect or indemnify *J. W.*, his executors, administrators, &c., by reason whereof the annuity bond became forfeited, and the grantee recovered against the plaintiff, administratrix of *J. W.*, and had judgment for 20*l.*, the amount of assets admitted to be in hand, and for the residue, judgment of assets quando: Held, that looking to the whole of the deed declared upon, there appeared a covenant by the defendant, not only to indemnify, but to pay the debt.

Semble, per *Parke J.* and held by *Patteson J.* that if the express covenant to protect and indemnify had stood alone, a sufficient breach of that covenant appeared (*Little dale J. dubitante*): Held, that the plaintiff might recover the whole arrears, for which she was liable, as administratrix, to the grantee of the annuity, though she had only

CUSTOM.

only paid a part. *Carr v. Roberts*,
T. 3 W. 4. Page 78

COVENANT TO STAND SEISED TO USES.

See MARRIAGE SETTLEMENT.

CRIMINAL INFORMATION.

See JUSTICES, 2.

CURATE.

See SETTLEMENT BY RENTING A
TENEMENT, 4.

CUSTOM.

1. The statute 11 G. 4. and 1 W. 4. c. 64., for permitting the general sale of beer by retail in *England*, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgesse. *Mayor, &c. of Leicester v. Burgess*, T. 3 W. 4. 246
2. A custom for the jurors of a court leet holden for a borough and manor, to present persons to be admitted burgesses of the borough, and for the persons so presented to be admitted and sworn in burgesses, was held, on motion in arrest of judgment, to be valid in law. *The King v. The Duke of Beaufort*, T. 3 W. 4. 442

CUSTOMARY COURT.

See COPYHOLD, 3.

DEATH, PRESUMPTION OF.

See EVIDENCE, 1.

DEED.

xxxvii

DECEIT.

See ACTION ON THE CASE, 2.

DEED.

See CANAL ACT, 2. MARRIAGE
SETTLEMENT. WAY.

Mortgagor granted, bargained, sold, released, and confirmed to mortgagee (in his possession then being by a previous bargain and sale) an iron-foundry and two dwelling-houses, &c. and the appurtenances; *together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses;*" and all trees, houses, cottages, commons, &c. easements, profits, &c. to the said foundry, messuages, and lands appertaining. There were cranes, presses, a steam engine, and other fixtures in the foundry, used for the purposes of the business carried on there, and valued at 600*l.*: Held, that the specification of the grates and other fixtures in and about the dwelling-houses, shewed that those in the foundry were not intended to pass, though they would have passed if the others had not been mentioned.

Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage: Held, that the possession of it by the plaintiff was *prima facie* evidence that it had been delivered to him as a deed. *Hars v. Horton*, M. 4 W. 4. Page 715

DEPOSIT.

See BANKER, 1, 2.

DEVISE.

DEVISE.

See COPYHOLD, 5.

1. Testator devises as follows: "As touching my worldly estate, I give, devise, and dispose of the same in the following manner: first, I give to my wife, *Anna, the whole of my estates, goods and chattels, living stock, and debts, during her widowhood, and no longer, but demise to go to my dear children, as I have appointed and disposed to them in lots and money.*" He then, after giving to his eldest son a sum of money, left to his second son a lot of land, (therein described) to him and his lawful heirs for ever; and if no heirs, to his next brother and his lawful heirs for ever. Then followed four other devises in similar terms to four other sons, and then he gave to his son John a dwelling-house, and piece of ground, &c; also his goods and living stock. He then devised to his daughter a house and gardens, and to her son and his lawful heirs for ever: Held that John took a life estate only in the house and ground devised to him. *Doe. d. Giblin v. Giblin, T. B. W. M.*

Page 122

2. Lands were devised, to the use, among others, that *M. A. F.* should take from and out of the same premises an annuity or yearly rent charge of 500*l.* a year, to be paid clear of all taxes and deductions, remainder to *S.* for life, subject to the annuity: Held that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently that *S.* who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity pursuant to the 45 *G. 3. c. 28, s. 5.* could not recover it again from

the annuitant. *Stow v. Davenport, T. 3 W. 4.* Page 359

3. Testator being seised in fee of lands, devised to trustees in fee, upon trust, as to part, to permit his eldest son to receive the profits for life, and as to other parts to permit his two daughters to receive the profits for life; and also upon trust, during the lives of his said children, to preserve contingent remainders.

And after the decease of any or either of his said children, he devised the estate to him or them limited for life as aforesaid, unto all and every his, her, or their child or children living at the time of his, her, or their parents' decease, or born in due time afterwards; for their lives as tenants in common; but, nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one; and any of them should die without leaving issue, the child or children of each of his said sons and daughters taking the rents and profits of his, her, or their parent's estate only.

And from and after the decease of all the children of each of his said sons and daughters without issue, he devised the estates to them respectively limited as aforesaid, unto and among all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining:

And for default or in failure of issue of any of his said sons and daughters, he devised the estates so limited to him, her, or them dying without issue, unto the survivors of his said sons and daughters, during their respective lives, in equal shares as tenants in common; and after their respective deaths,

DEVISE.

deaths, he devised the same to the children of the survivor of his said sons and daughters, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters.

And for default or in failure of issue of all his said sons and daughters except one, he devised all his said estates unto his only surviving son or daughter in fee.

Held that under this will, the eldest son of the testator did not take an estate tail (unless in remainder) but an estate for life; that his children took estates tail in undivided shares as tenants in common.

The doctrine that, in construing a devise, the general intent is to be preferred to the particular intent, is incorrect and vague; the true rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator use inconsistent words; unless the inconsistent words are of such a nature as to make it clear that the technical words are not used in their proper sense. *Doe dem. of J. A. Gallini v. F. A. Gallini*, *M. 4 W. 4.* Page 623

4. A. devised copyhold lands to his son D. S. and his wife, and J. H. and his wife, or the survivor of them, for their lives; and after the decease of all of them, to the male heir at law of him the testator, his heirs and assigns for ever; he then bequeathed legacies to three other sons, and afterwards died leaving five sons and one daughter, three by his first wife, and three by the second: Held that the fee vested at the testator's death, in the person who was then his male

VOL. V.

EJECTMENT.

xxxx

xxxix

heir at law, and did not remain contingent until the determination of the life-estates. *Doe dem. Pilkington v. Spratt*, *M. 4 W. 4.* Page 731

DISTRESS.

The 1 & 2 *Phil.* and *M. c.* 12. s. 9, which enacts, "that no person shall take for keeping in pound, impounding, or poundage of any distress, above 4d. for any one whole distress that shall be so impounded," does not extend to cases where the goods are impounded on the premises, by virtue of the 11 *G. 2. c.* 19. s. 10. *Child v. Chamberlain, Bond, Jessopp, & Others*, *H. 4 W. 4.* 1049

DIVISIBLE ALLEGATION.

See *PLEADING*.

EASEMENT.

See *WAT.*

ECCLIESIASTICAL COURT.

See *PROHIBITION*.

EJECTMENT.

1. Ejectment may be maintained for freehold lands on the demise of a person attainted of felony, when there has been no office found on behalf of the king. *Doe dem. Griffith, v. Pritchard*, *M. 4 W. 4.* 765
2. In a second action of ejectment brought for the same premises, the Court will stay proceedings till the costs of the former are paid, although the former action was discontinued before consent rule,

d

or

- or plea. *Doe dem. Langdon v. Langdon*, M. 4 W. 4. Page 864
3. A. having brought an ejectment had judgment of nonsuit against him; afterwards he was discharged under the Insolvent Debtor's Act, the costs of the ejectment being inserted as a debt in his schedule. The assignee of his estate having brought a second ejectment upon the insolvent's original title, the Court stayed the proceedings in it until the costs of the first were paid. *Doe dem. Standish v. Roe*, M. 4 W. 4. 878
4. In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage; although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant. *Doe dem. Marriott v. Edwards*, H. 4 W. 4. 1065

ELECTION OF CORPORATE OFFICER.

See QUO WARRANTO.

EMBLEMENTS.

Tenant for a term determinable upon a life sowed the land in spring, first with barley and soon after with clover. The life expired in the following summer. In the autumn, the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it; but the increase of the value did not compensate for the expence of cultivating the clover, and a farmer would not be repaid such expence in the autumn

EVIDENCE.

of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing: Held that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley. *Graves v. Weld*, T. 3 W. 4. Page 105

ENTRIES IN CORPORATION BOOKS.

See CORPORATION.

ENTRY.

See FINE. LEASE, 6.

ESCROW.

See EVIDENCE, 5. DEED.

ESTATE TAIL.

See DEVISE, 3.

EVIDENCE.

See ARBITRAMENT, 2. BILL OF EXCHANGE, 1, 2. CORPORATION. FRAUDS, STATUTE OF, 1. LEASE 5. PLEADING, 3, 4, 6, 8. SETTLEMENT BY BIRTH. STAMP, 1, 3.

1. A person who has not been heard of for seven years, is presumed to be

- be dead ; but there is no legal presumption as to the time of his death. The fact of his having been alive or dead at any particular period during the seven years must be proved by the party relying on it. *Doe dem. Knight v. Nepean, Bart. T. 3 W. 4.* Page 86
2. In an action against executors for a debt of the testator, a person entitled to an annuity under the will is not disqualified by interest from giving evidence for the defendants. *Nowell v. Davies, T. 3 W. 4.* 368
3. A witness may be called upon by the plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. *Griffith Gent., One, &c. v. Davies, M. 4 W. 4.* 502
4. An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal that, when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish ; and therefore upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may shew by *parol* evidence, that the first order of removal was quashed, on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement, and that he afterwards sold the tenement and thereby became removable. *The King v. the Inhabitants of Wick, St. Lawrence, M. 4 W. 4.* 526
5. Plaintiff at the trial produced a deed of mortgage, executed to him by defendant. The latter proved, that on executing it he handed it to his own agent, intending it, as he alleged, to remain as an escrow, till the performance of a certain agreement by another party to the mortgage : Held, that the possession of it by plaintiff was *prima facie* evidence that it had been delivered to him as a deed. *Hare v. Horton, M. 4 W. 4.* Page 715
6. A merchant at *Sydney* shipped goods for *England* on board the ship *C.*, and by another ship that sailed after her, wrote to an agent in *England*, and desired him if he received that letter before the *C.* arrived to wait thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days, effected an insurance through the intervention of a broker, who told the underwriters when the *C.* sailed, and when the letter ordering the insurance was written, but did not state when it was received, nor the order to wait thirty days after the receipt of it, before effecting the insurance. The *C.* never arrived. The assured brought an action on the policy against the insurers, but failed, on account of the suppression of facts by the broker. In an action by the assured against the broker, for negligence in effecting the policy : Held that the evidence of underwriters and brokers was not admissible to shew, that in their opinion the matters not communicated were material. *Campbell v. Rickards, M. 4 W. 4.* 840
7. Five parish officers were appointed for a certain year, viz., two churchwardens, two overseers, and one vestry clerk and assistant overseer the terms of whose appointment did not appear. At their vestry-meetings for the relief of the poor, orders were given to the paupers upon a shopkeeper for goods,

goods, and sometimes for money to pay their monthly allowances; which orders the shopkeeper complied with. Three only of the officers ever signed such orders; the assistant overseer being one, signing sometimes by his name only, and sometimes as clerk, or overseer. All used to attend the board, and when called upon there to pay the shopkeeper for his goods and advances, had severally promised to do so when they could:

Held, that the shopkeeper, after the expiration of the year, might recover against all the parties both for the goods and the advances of money, if a jury were of opinion that they had all contracted with the plaintiff.

And, that it was not necessary to show by the appointment of the assistant overseer that he was authorised so to contract, the jury being satisfied that he had in fact bound himself to the plaintiff in respect of the goods and money supplied. *Kirby v. Banister*, *H. 4 W. 4.* Page 1070

8. Where an information for libel states certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and the prosecutor at the trial, gives general proof of such transactions to support the introductory part of his pleading the defendant is not thereby authorised to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel.

But if such evidence be adduced bonâ fide to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, and that the Judge is informed that the evidence is offered for that purpose, it is admissible.

Affidavits are not receivable to show that a judge is mistaken in his report of a cause tried before him. *The King v. Grant*, *H. 4 W. 4.* Page 1082

FALSE REPRESENTATION.

See ACTION ON THE CASE, 2.

FELONY.

See COPYHOLD, 2. *LEASE*, 6.

FEME COVERT.

See ORDER OF REMOVAL.

To a declaration against husband and wife for a debt due from the wife before coverture, the husband's discharge under the insolvent act is a good plea.

Quere, whether it can be replied that the wife had separate property. *Lockwood v. Satter*, *T. 3 W. 4.* 303

FEOFFMENT.

See LIVERY OF SEISM.

FINE.

It is a sufficient entry to avoid a fine, if the party enters expressly to claim the premises as his own: it is not necessary for him to say that he enters to avoid all fines, or to specify what particular act, adverse to his own interest, he means to defeat *Doe dem. Jones v. Williams*, *M. 4 W. 4.* 783

FIXTURES.

See BANKRUPT, 1. *DEED*, 1. *PLEADING*, 4.

FORFEITURE.

See COPYHOLD, 4. *LEASE*, 6.

FRAUDS,

FRAUDS, STATUTE OF.

1. By agreement in writing, *A.* contracted to sell *B.* several lots of land and to make a good title to them: and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then verbally agreed between the parties, that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted. In an action brought by the vendor to recover the remainder of the purchase money, the declaration stated that the defendant agreed to deduce a good title to all the lots except one, and that the vendee discharged, and exonerated him from making out a good title to that lot and waived his right to require the same:

Held, that oral testimony was not admissible, to show the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing; and by the statute of frauds, in every action brought to charge a person on a contract for the sale of lands, the agreement must be in writing. *Goss v. Lord Nugent*, T. 3 W. 4. Page 58

2. In an agreement in writing to pay the debt of another, the consideration must either be stated in express words or must be necessarily implied from the terms used. A letter, therefore, from the defendant to the plaintiff in the following words: "As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day, 14th January, 1833," was held not to satisfy the

statute of frauds. *James v. Williams*, H. 4 W. 4. Page 1109

FREIGHT.

In indebitatus assumpsit for freight, it appeared that goods were laden in *Jamaica* on board the plaintiffs' ship, according to a bill of lading, which stated them to have been shipped by *W. J.* on a vessel bound for *London* on account of the defendant, and that they were to be delivered in *London* to the consignees, *paying freight for the same* at the rate therein mentioned; the goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees without receiving the freight, it was held that the defendant was liable by law to pay the freight to the shipowners; and that independently of any express contract by charter-party. *Domett v. Beckford*, M. 4 W. 4. 521

GENERAL AND PARTICULAR INTENT.

See DEVISE, 3.

GOODS SOLD AND DELIVERED.

See ASSUMPSIT, 2.

GRANT.

See COPYHOLD, 3.

HERIOT.

See COPYHOLD, 3.

HIGHWAY.

1. The inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.

Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them.

By an act for draining fen lands, commissioners were authorised to make drains and other works therein prescribed, and also to make a new cut or main drain as therein mentioned, and to dispose of all earth and soil arising from the drains directed to be made, in forming banks at certain distances on each side thereof, and the banks, drains, &c. were to remain under their control for the purposes of the act. The commissioners, under the powers of the act, made a drain according to the act, and with the earth taken from it made a bank on one side of it, of the average breadth of forty feet: this drain and bank were never part of the fen, but were old inclosed land, and bounded by old inclosures on both sides; and the land upon which they were respectively made, was purchased by the commissioners for the purposes of the act. The bank had been used for about twenty-five years as a public highway and was a convenient and useful road for the public.

Upon special case, stating these facts, it was held by *Denman C. J.* and *Parke J.* (*Littledale J.* dissentiente) that the dedication of this part of the bank as a road to the use of the public was not in-

consistent with the purposes to which the commissioners were bound by the act to apply it, it not appearing by the case (which, however, ought to have been more express on these points, per *Parke J.*) that the cleansing of the drains or any other purpose of the act had been or was likely to be interfered with by such user of the soil.

The King v. The Inhabitants of Leake, M. 4 W. 4. Page 469

2. The general turnpike act 4 G. 4. c. 95. s. 87. gives an appeal to the sessions to any person who shall think himself aggrieved by any thing done by any two justices in pursuance of that act, or any local turnpike act; and declares that the determination of the sessions shall be final and conclusive, and that no proceeding to be had in pursuance of that act shall be removed by certiorari. The sessions on appeal against a certificate of two justices, that a turnpike road made under a local act had been completed and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, this Court refused to grant a mandamus to them to hear the appeal, on the ground that their decision was contrary to the local act.

A local turnpike act recited that the making and maintaining a new turnpike road from *Leeds* to join the *Wakefield* and *Halifax* turnpike road at a certain point, and several branch roads (therein also described) from and out of the said main turnpike road, would be an advantage to the inhabitants of *Leeds* and *Halifax*, and to the public in general; and it authorised the making of the said several roads, and enacted "that the said new roads should not be respectively opened to the public, or become

become public roads, until two justices should have certified that the said roads respectively, and the works thereon respectively, were completely made and fit to be travelled upon throughout the whole length of such roads respectively."

Semble, per *Littledale* and *Taunton* Js., that the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed and fit to be travelled on, but that the main road, when so completed and certified to be so by two justices, became a public road, although the branch roads were still unfinished. *The King v. The Justices of the West Riding of Yorkshire*, H. 4 W. 4. Page 1003

HIRING FOR A YEAR.

See MASTER AND SERVANT, 1, 2.

INCLOSURE ACT.

1. By an act for inclosing common lands in *G.* after reciting that the corporation of *G.* claimed the right of soil as lords of the manor, and that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted that the commissioners might set out and allot plots of ground out of the *East* and *West Commons* in *G.* as a compensation for the rights of common of *all the owners and proprietors of commonable messuages or cottages*, for such messuages or cottages only, as well on the said commons as on certain other lands named, such plots of ground to be used and enjoyed as the commissioners should by their award direct. Parties dissatisfied with the award might bring an action against the persons

in whose favour the determination should be, within three months, or might appeal within six months to the justices in quarter sessions who were to determine the matter and award costs and damages. In default of such action or appeal, the determination of the commissioners was to be final.

The commissioners by their award, allotted a plot of land on the *West Common* as common pasture, to the owners and proprietors of commonable messuages or cottages, and their respective tenants or occupiers of the said messuages and cottages only having a right of common on the said *West Common*; and they limited the use of the pastures as the act empowered them.

Before the passing of the act, the rights attached to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of *G.* Subsequently to the act one of the messuages on *West Common* being in the hands of a person not a freeman, the corporation brought trespass against him for turning his cattle on the above mentioned allotment:

Held, that the act, though general in its words, did not authorise the commissioners to extend the benefit of their allotments in lieu of common, to occupiers who were not freemen; and that the award itself did not purport to do so; nor could it have done so unless the act had given power to the commissioners to ascertain who should be entitled to the newly granted rights: and consequently, that the present action was maintainable, though brought more than six months after the award. *The Bailiffs of Godmanchester v. Phillip's*, T. 3 W 4. Page 198

2. By an inclosure act it was declared that all the allotments to be set out to the several persons having
d 4 right

right of common upon a moor should be deemed to be situate within the same townships and places respectively, wherein the lands lay in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of *W. P.* to certain coal mines under the said moor: Held, that the first clause affected only those portions of the soil which were allotted to the commoners, and not the coal mines under those allotments; and therefore that such coal mines were rateable to the relief of the poor in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere. *The King v. Pitt, M. 4 W. 4.* Page 565

INDICTMENT.

See NEW TRIAL.

1. An indictment found at the *Suffolk* Lent assizes 1893, on a charge of felony preferred in *September* 1832 was removed into *K. B.* by certiorari, and a motion made to award a venire into another county, on a suggestion that a fair trial could not be had in *Suffolk*; in support of which application many affidavits were put in, sworn in the autumn of 1832, shewing that a strong prejudice existed in *Suffolk* against the defendants on the subject of this charge.

The Court held that there were not sufficient grounds laid for removing an indictment from the body of a large county, and discharged the rule. *The King v. Holden and Another, T. 3 W. 4.* 347

2. An indictment for a libel on the governor of a parish workhouse was preferred by the direction of the select vestry of the parish;

and the defendant having removed it by certiorari into *K. B.*, was convicted: Held, that the libelled party was not the party grieved, within the statute 5 & 6 *W.* and *M. c. 11. s. 3.* and therefore was not entitled to costs. *The King on the prosecution of Brindley v. Dewhurst, T. 3 W. 4.* Page 405

3. An act of parliament prohibited the erection or continuance of any building within ten feet of the road, and declared that the foot-paths should be subject to the act, and be part of the road. It further enacted that if any such building should be erected or continued contrary to the act, it should be deemed a common nuisance. By another clause, two magistrates were empowered to convict the proprietor and occupier of such building, and to make an order for the removal thereof:

Held, that notwithstanding the latter clause the party who erected or continued a building, contrary to the act might be indicted for a nuisance:

Held also, that an open shop, having its front built on the foundation of an old wall immediately adjoining the foot-path, and connected by a roof with the front of a house which was more than ten feet from the road, was a building within the meaning of the act. *The King v. Gregory, M. 4 W. 4.* 555

INFANCY.

See BILL OF EXCHANGE, 1.

INHABITATION.

See SETTLEMENT BY APPRENTICESHIP, 2.

INJUNCTION.

See ARREST, 2.

INNS OF COURT AND
CHANCERY.

See MANDAMUS, 6.

INQUISITION.

See CORONER.

INSOLVENT ACT.

See EJECTMENT, 3. FEME COVERT.

INSURANCE.

1. Valued policy of insurance on ship and goods at and from the coast of *Africa* to the ship's port of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and wheresoever, to trade backwards and forwards in any order, and to call at or proceed to the *Azores, Madeira, &c.*, and all *African* islands; beginning the adventure on the goods from the loading thereof aboard the said ship, twenty-four hours after her arrival on the coast of *Africa*, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter, or exchange with any ships or factories wheresoever she might call.

First, The policy does not protect an outward cargo shipped before the vessel's arrival on the coast of *Africa*.

Secondly, A considerable proportion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy: Held that the valuation was opened; and that although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on

board, made up the amount named in such valuation, the assurer could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss. *Richman and another v. Carstairs, M. & W. 4.* Page 651

2. A ship was insured from *April* 1st, 1831, to *January* 1st, 1832, warranted not to sail foreign after the times limited in certain club rules. The rules or warranties of the club limited the times of sailing to different parts of the world; and by a distinct warranty (the ninth), it was declared that the time of clearing at the custom-house should be deemed the time of sailing, *provided the ship was then ready for sea.* The vessel insured was bound for the bay of *Fundy* from *Dublin*, and the last day for sailing by the rules, was the 1st of *September*. She cleared out on the 31st of *August*, and dropped down the *Liffey* on the 1st of *September*, with an incomplete crew (though a full complement was engaged before the ship cleared out), to a place within the port of *Dublin*, where she lay at anchor the rest of the day. During that day the whole crew came on board, and on the 2d she proceeded on her voyage, having been prevented doing so on the 1st by an unfavourable wind. She was afterwards lost:

Held per *Littledale J.*, and semble per *Taunton J.*, that the policy must be construed as incorporating the ninth article of warranty, and not merely the several directions as to the times of sailing. (*Denman C. J.*, and *Patteson J.* dubitantibus):

Held by all the Court, that the ship did not actually sail till after the 1st of *September*, and that she was not ready for sea at the time of clearing out, the whole crew

crew not being then on board. — (*Littledale J. dubitante*), that the words in the ninth article of warranty, "provided the ship is then ready for sea," if incorporated with the policy, must be limited to the point of time at which the clearances were obtained, and that as the vessel was not then ready for want of a full crew, there had not been a constructive sailing on or before the 1st of *September*, according to the ninth warranty. By one of the rules it was provided, that vessels might sail after the limited time, on payment of an additional premium, as per scale; and by another rule, every member of the club, before the commencement of each voyage, was to give his acceptance for the premium; and parties neglecting to give notice were subject to a penalty: Held (assuming that these rules could be incorporated with the present policy), that a party whose ship had sailed too late and been lost, could not afterwards obtain the benefit of the extended time, by submitting to the penalty and paying the extra premium. *Graham v. Barras, H. 4 W. 4. Page 1011*

INSURANCE BROKER.

See EVIDENCE, 6.

A trustee suing as a plaintiff in a court of law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the cestuique trust who uses his name. And, therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants, pleaded payment to the plaintiff, according to the tenor and effect of the policy, and the proof was,

that after the loss happened, the assurers paid the amount to the broker, by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action. *Gibson v. Winter and another, T. 3 W. 4. Page 96*

INTEREST.

See BANKER, 1.

INTERPLEADER ACT.

See PRACTICE, 8.

JUDGMENT.

See PLEADING, 1. PRACTICE, 9.

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of *Yorkshire*, to secure payment of an annuity, need not be registered under 8 *G. 2. c. 6.*; for though it may be enforced by sequestration, the benefice is not affected by the judgment.

The judgment was for 1800*l.* The warrant of attorney provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a sequestrari facias thereupon, it appeared that at that time the former creditor had by sequestrations levied more than 1800*l.* for arrears of his annuity, and there

there were arrears still due. The Court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l.*, levied before the signing of his judgment. *Cottle v. Warrington, Clerk, T. 3 W. 4.* Page 447

JUSTICES.

1. An adjudication of justices under 11 *G. 2. c. 19. s. 4.* (inflicting penalties for fraudulently removing goods to avoid a distress) is an order, and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form. *The King v. The Justices of Cheshire, T. 3 W. 4.* 439
2. A party who applies to the Court for a criminal information against a defendant, for breach of duty as a magistrate as well as an individual, must, before motion, give notice to the defendant of his intended application. *The King v. Heming, M. 4 W. 4.* 666
3. A party gave information on oath before a magistrate, that from certain language used towards him he was in bodily fear from another; and the magistrate upon hearing the complaint required the latter to enter into recognizances to keep the peace. On motion to discharge the recognizances, on the ground that the language was used in a metaphorical sense only, the Court refused to interfere, because it was for the magistrate to judge in what sense the language was used. *The King v. Tregarthen, M. 4 W. 4.* 678

JUSTICES, ORDER OF.

An order of justices under the 11 *G. 2. c. 19. s. 4.* adjudging a party to pay double the value of goods fraudulently and clandestinely removed to prevent a distress, must shew on the face of it that the party removing the goods was tenant; and that is not sufficiently shewn by stating that, on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent *A. B.* from distraining them for arrears of rent due to him for the said premises; and that it appearing that he did so remove, &c. he is convicted thereof.

Semble, also that the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord. *The King v. Davis and Another, M. 4 W. 4.* Page 551

LANDLORD AND TENANT.

See EJECTMENT, 4. EMBLEMENTS.
JUSTICES, ORDER OF. LEASE, 3.

LEASE.

1. Under a lease of all that part of the park called *B.*, situate and being in the county of *O.* and now in the occupation of *S.*, lying within certain specified abutments, with all houses, &c. belonging thereto, and which now are in the occupation of *S.*, a house on a part which is within the abutments, but not in the occupation of *S.* will pass. *Doe dem. Smith and Others v. Galloway, T. 3 W. 4.* 43
2. Lands were devised to *R. N.* for life, with power to lease for lives all but a certain excepted portion, reserving the like rents as were then reserved, or more. The rent of the lands to be demised was then

then 29*l.* a year. In 1800 *R. N.* made a lease of the last-mentioned lands to *G. M.* for three lives, at the yearly rent of 35*l.* In 1813 he made another lease to *G. M.* of the same premises and part of the excepted lands, for different lives, at the rent of 40*l.* for the whole: Held, that the rent could not be apportioned, and that the last lease, being void for the excepted lands, was void as to all.

Doe dem. Williams and Others v. Matthews, 13 *W. 4.* Page 298

5. Premises were demised for a term at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days: the lessee covenanted to pay the rent, and the landlord covenanted that he, paying the rent at the appointed times should quietly enjoy, &c.:

Held, that the lessee having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued, the rent had been in arrear more than twenty-one days; for that the payment of rent was not a condition precedent to the performance of the covenant for quiet enjoyment.

Dawson v. Dyer, *Bart. M. 4 W. 4.*

584

4. Where *A.* demises to *B.* for the term of his natural life, the demise is, *prima facie*, for the life of *B.* But where *A.* demised to *B.* his executors and administrators, for the term of his natural life, and the lease contained a covenant by *A.* for quiet enjoyment of the premises by *B.*, his executors. &c. during the natural life of *A.*:

Held, that the word "*his*" in the demising clause must be referred to *A.* the grantor, and not to *B.*, though his name was the last antecedent. *Doe on the demises of Pritchard and Others against Dodd*, *M. 4 W. 4.* 689

5. A power was reserved to grant

leases for a term not exceeding seven years, so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof. The donee of the power granted a lease for seven years, at a specified rent, which lease contained a covenant by the lessee, to find board, lodging, and wearing apparel during the term, for three children of the donee (if they wished it), at 7*l.* a year each, and for the donee's son gratis: Held, by *Parke* and *Pateson* Js. (*Taunton J.* dissentiente) that assuming the power to require two conditions, first, that the rent reserved should be the best rent; and, secondly, that there should be no fine or premium: it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, parol evidence was admissible to shew that the rent reserved was the best that could be obtained. *Doe dem. Rogers v. Rogers*, *M. 4 W. 4.*

Page 755

6. A lease for three lives contained a proviso, that if the lessee, his heirs, &c. should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void. Tenant (being the second cestuique vie) under such lease, was attainted of felony, and transported. His mother and sister occupied the farm from that time, till the expiration of the third life named in the lease, and during that period the reserved rent was regularly paid to *R. W. P.*, to whom the reversion had come by devise, and who knew all the facts. The time

of

of his becoming entitled did not appear. The reversioner, on the expiration of the third life, supposing that the term was at an end in point of law, let the land to a new tenant, whom he afterwards ejected, the attainted party being still alive.

Quære, whether the attainer of the tenant was a forfeiture of the lease; but, held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction:

Quære also, if a forfeiture was committed, whether it was one of which an assignee of the reversion might take advantage by stat. 32 H. 8. c. 34.

Held, that if such a forfeiture was committed, the reversioner had waived it by accepting the reserved rent under the lease, from the parties occupying the premises:

Semble, that if the forfeiture had not been waived, a sufficient entry had been made to avoid the lease. *Doe dem. Griffith v. Pritchard*, M. 4 W. 4. Page 765

7. An instrument in writing, whereby *A.* agreed to let premises to *B.* for seven, fourteen, or twenty-one years (commencing at *Christmas Day* then next), at the option of *B.* at the yearly rent of 2*l.* payable quarterly, the first payment to be made at the ensuing *Lady Day* free of all rates and taxes, and whereby *B.* stipulated if he should be desirous of putting an end to the agreement at either of the terms before specified, to give six months' notice, and that he, *B.*, should pay all the expences of preparing a lease for either of the terms above stated, is a lease, and not a mere agreement for a lease. *Warman v. Faithful*, H. 4 W. 4.

LEASEHOLD.

See VENDOR AND VENDEE.

LEET.

See CUSTOM, 2.

LEGACY DUTY.

See DEVISE, 2.

LICENCE.

See ACTION ON THE CASE, 1.

LIEN.

See STOPPAGE IN TRANSITU, 1, 2.

A. wishing to borrow money on a mortgage of land, delivered the title-deeds to *B.*, the intended mortgagee, for examination, and said that he would pay all expences. *B.* handed the deeds to his own attornies to be investigated. The negotiation went off, and the attornies being requested by *A.* to return his deeds, refused to do so till he paid their bill of costs. On assumption brought by *A.* against the attornies, to recover back the money so paid;

Held that the defendants could not be considered as having acted for both parties in the negotiation, and therefore had not a lien against *A.* as his attornies: that, supposing *A.* liable to *B.* for the costs incurred, *B.* could not communicate to his own attornies a lien upon *A.*'s deeds, by handing them to the attornies for investigation: that the undertaking of *A.* to *B.*, if it amounted to a promise to pay these costs, did not entitle *B.*'s attornies to detain the deeds, as it established no privity between them and *A.*: And that *A.* might have brought trover for the deeds, and was entitled to recover

cover in this action. *Pratt v. Vizard, Gent., One, &c. and Blower Gent., One, &c. M. 4 W. 4.*

Page 808

LIFE ESTATE.

See DEVISE, 1.

LIMITATION OF ACTION.

See CANAL ACT, 1.

LIVERY OF SEISIN.

Livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having title, unless the child was placed there for the purpose of representing that party.

If there be several coparceners, and one only be in actual possession, a feoffment executed by her to a stranger, of the whole premises, will oust the other coparceners.

In the absence of evidence to the contrary, the entry of such coparcener will be presumed to have been a general entry, and not for herself alone or for herself and the other coparceners. *Doe dem. Reed v. Taylor, M. 4 W. 4. 575*

LOAN.

See BANKER, 2.

MALICIOUS ARREST, ACTION FOR.

In an action for a malicious arrest, malice is a question of fact for the jury, who are at liberty, but not bound, to infer it from the want of probable cause: and where a creditor had caused his debtor to be arrested for 45*l.*, knowing that there was a set off to the amount

MANDAMUS.

of 16*l.* 5*s.*, but instructed the bailiff who made the arrest, to allow the set-off in case the debtor would settle the debt; and the Judge, upon the proof of these facts, was of opinion that there was no probable cause for the arrest, and that there was malice in law, inasmuch as the act of causing the party to be arrested for a larger sum than he owed was wrongful, and therefore told the jury that the only question for them was the amount of damages; the Court granted a new trial, on the ground that it ought to have been left to the jury to find whether there was malice or not. *Mitchell v. Jenkins, Clerk, M. 4 W. 4. Page 588*

MANDAMUS.

1. By custom the court of mayor and aldermen of *London* have always had authority to examine and determine whether or not any person returned to them by the court of wardmote as an *alderman* is, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned has been brought into question. In *February, 1831*, *M. S.* was elected alderman by the citizens, and returned as elected to the court of mayor and aldermen. That court, on the petition of persons interested in the election, adjudged and determined that *M. S.* was not a person fit and proper to discharge the duties of alderman. In *January 1832*, *M. S.* was a second time elected alderman by a majority of votes, and returned so elected to the court of mayor and aldermen, but they again refused to admit him to the office.

A rule nisi having been obtained for

for a mandamus to admit *M. S.* to the office :

Held, that an affidavit stating that the court of mayor and aldermen had again determined that he was not a fit and proper person to be admitted, is no ground for refusing the mandamus, because the prosecutor has a right to have the facts stated in the return, in order that he may have an opportunity of controverting the truth of them :

Held, at all events, that the affidavits in answer to the rule ought to show that the court of mayor and aldermen had, on the second occasion, come to the conclusion that *M. S.* was not a fit and proper person to be admitted to the office, on a fresh investigation.

A mandamus having issued, the return stated, that *M. S.* was elected by a majority of votes, and returned as so elected to the court of mayor and aldermen ; that a petition was presented to that court against *M. S.*'s admission to the office, whereupon they examined the merits of the petition according to custom, and determined that he was not a fit and proper person to be admitted to the office, nor *duly elected* ; and further, that he was not in fact *duly elected* : Held, that this return was not inconsistent. *The King v. The Mayor and Aldermen of London*, T. 3 W. 4. Page 233

2. Mandamus lies to admit a clerk of trustees under the general turnpike acts. *The King v. The Trustees of the Cheshunt Turnpike Roads*, T. 3 W. 4. Page 438
3. Where the quarter sessions have improperly decided against an appeal on a preliminary objection, the Court of King's Bench will grant a mandamus to them to enter continuances and hear the appeal ; but where an objection has been made during the trial of an

appeal to the reception of a particular piece of evidence, and the sessions have held such objection valid, in consequence of which the appeal has been dismissed, this Court will not interfere, unless the sessions send up a case. *The King v. The Inhabitants of Fries-ton*, M. 4 W. 4. Page 597

4. By statute, parties were enabled, in certain cases, to appeal to the quarter sessions for a particular district, giving ten days' notice. The act said nothing as to further notice in the event of such appeal being respited, nor did it appear that there was any rule of practice on the subject at those sessions. An appeal under the statute, of which due notice had been given, was respited, and came on at a subsequent sessions, pursuant to the respite. The appellant was called upon to prove that he had given notice of trial of the *respited appeal*, and on his failing to do so, the appeal was dismissed :

Held, that the sessions were wrong in requiring such notice, and that the case was one in which this Court might overrule their decision. Mandamus granted to hear the appeal. *The King v. The Justices of the West Riding of Yorkshire*, M. 4 W. 4. 667

5. To ground an application for a mandamus to inspect books, quære, whether it is sufficient to show that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favour, and that he refused to accept it otherwise than as a right. Per *Denman C. J.* *The King v. The Trustees of the North Leach and Witney Roads*, H. 4 W. 4. 978
6. A rule nisi was granted for a mandamus to the Principal of *Clifford's Inn*, to attend the benchers of the *Inner Temple*, and produce the rules and regulations

actions of the society of *Clifford's Inn*, to enable the benchers to decide on the validity of his election to that office. But on cause shown, the rule was discharged, no sufficient proof appearing, that the benchers of the *Inner Temple* had a compulsory authority over *Clifford's Inn* for this purpose. *The King v. Allen, Gent., H. 4 W. 4.* Page 984

7. A resolution of a court of quarter sessions, that whenever an appeal against an order of removal shall be entered and respited, notice thereof shall, within one month after such entry and respite, be given to the officers of the removing parish, is void; and where the court of quarter sessions had dismissed an appeal for want of such notice, this Court granted a mandamus to them to hear it. *The King v. The Justices of Norfolk, H. 4 W. 4.* 990

8. Under stat. 1 W. 4. c. 21. s. 6., the costs of a mandamus, and of applying for it, may be obtained of the Court by a distinct motion after issuing of the writ.

And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties. *The King v. Kirke, H. 4 W. 4.* 1089

9. A party found guilty by a jury at a session irregularly holden is entitled to have the record of the proceedings correctly made up according to the fact, and this Court will grant a mandamus to the justices to make up such record. *Rex v. the Justices of Middlesex, in re Bowman* 1113

MARRIAGE SETTLEMENT.

- A father, seised in fee, executed a deed of settlement on the marriage of his son, containing the following

MASTER AND SERVANT.

clause: — “Whereas it is agreed upon by and between the parties to these presents, that the said *A. J.* (the father) giveth and settlcth upon his said son *Griffith J.* all and singular the premises, &c. from Michaelmas next for the term of his natural life; and from and immediately after his decease, to the use of the first son of the body of the said *Griffith J.* on the body of *J. J.* (his intended wife) to be lawfully begotten, and so on successively for all and every other son,” &c.; and in default of such issue male, the like limitation to the daughters; and for want of such issue, to the use of the settlor's right heirs: Held, that this clause was not a mere executory agreement, but operated, in law, as a covenant by the settlor to stand seised to the uses declared by the settlement. Namely, to the uses of the first and other sons of *Griffith J.* successively for their respective lives. *Doe dem. Jones v. Williams, M. 4 W. 4.* Page 783

MASTER AND SERVANT.

1. In an action for wages by a servant, who was dismissed, the proof was, that he was to have wages at the rate of 80*l.* per annum: Held that the *prima facie* presumption was, that the hiring was for a year; and that having been rightfully dismissed for misconduct before the year expired, he could not recover wages *pro rata*. And this, although the master had brought an action against him for the misconduct, and recovered damages. *Turner v. Robinson, M. 4 W. 4.* 789
2. On the 5th of March 1822, *A.* entered as warehouseman into the service of *B.*, the latter engaging to pay *A.* at the rate of 12*l.* 10*s.* per month for the first year, and to advance 10*l.* per annum until the

NEW TRIAL.

the salary was 180*l*. Held that this was a contract by *B*, to employ *A*. for one whole year. *Fawcett v. Cash*, *H. 4 W. 4*. Page 904

MILITIA MAN.

See SETTLEMENT BY HIRING AND SERVICE, 3.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 1.

MORTGAGE.

See DEED. EJECTMENT, 4.

MORTGAGOR AND MORTGAGEE.

See LIEN.

MOTION TO SET ASIDE AWARD.

See ARBITRAMENT, 2, 3.

NEGLIGENCE.

See BILL OF EXCHANGE, 2, 3.

NEW TRIAL.

See PRACTICE, 5, 10.

On indictment for non-repair of a highway which defendant was stated to be liable to repair ratione tenuræ, and verdict found for the defendant, a new trial was moved for, on the ground of misdirection, and the improper rejection of evidence. The Court refused a new trial, but suspended the judgment in order that a new indictment might be preferred.

Quære, whether a new trial is grantable after acquittal in any criminal case, except a penal action. Vol. V.

ORDER OF REMOVAL.

tion. *The King v. Sutton*, *T. 2 W. 4*. Page 42

NON EST FACTUM, PLEA OF.

See CORPORATION.

NOTICE OF APPEAL.

See MANDAMUS, 4, 7.

NUISANCE.

See INDICTMENT, 3.

OCCUPIER.

See POOR RATE. SETTLEMENT BY RENTING A TENEMENT, 2.

ORDER OF JUSTICES.

See JUSTICES, ORDER OF.

ORDER OF REMOVAL.

See SETTLEMENT BY ESTATE.

Two justices ordered *F. C.* the wife of *R. C.* a Scotchman, having no settlement in *England*, and a lunatic, to be removed from parish *A.* where she had become chargeable to parish *B.*, which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made: Held, that the order was not void on the ground that it would effect the separation of husband and wife; because it was not to be presumed that when it was made, the husband was residing in parish *A.*, or was not residing in parish *B.* *The King v. The Inhabitants of Stockton*, *M. 4 W. 4*.

546

• ORGANIST.

ORGANIST.

See SETTLEMENT BY SERVING AN OFFICE.

PARTNERSHIP.

1. *A.* and *B.* dissolved partnership, and agreed that the business should be carried on by *B.* alone; and that he should receive and pay all debts. Sufficient partnership funds were left in his possession. *C.*, a creditor of the firm, afterwards applied for payment of his debt to *B.*, who informed him that *A.* knew nothing of his debt, and that he, *C.*, must look to *B.* alone. *C.* then drew a bill on *B.*, which he accepted, but which was afterwards dishonoured: Held, in an action brought by *C.* against *A.* and *B.* (the latter having become bankrupt), that it was a question for the jury whether it had been agreed between *C.*, the creditor, and *B.*, that the former should accept *B.* as his sole debtor, and take his acceptance in satisfaction of the debt due from both: Held further, that such an agreement and receipt of the bill would be a good answer to a suit by way of accord and satisfaction; and that the fact of *B.* having had the partnership effects left in his hands, and having agreed with *A.* to pay all the partnership debts, was evidence of an authority from *A.* to make such agreement on his behalf.

After a rule for a new trial had been granted on the above grounds, *A.* also became bankrupt, but *C.* did not prove his debt under the commission. *A.*'s attorney having carried down the record by proviso, *C.* applied for a stet process, alleging that he could derive no benefit from proceeding. The Court refused to interfere.

Thompson v. Percival, Hilary T. 4 W. 4. Page 925

2. One of several partners in trade who pays money on account of his co-partners, cannot maintain an action against them for contribution, on the ground that he made such payment not voluntarily, but by compulsion of law. *Sadler v. Nison, 4 W. 4.* 936

PART OWNER.

See BANKER, 2.

PAYMENT.

See INSURANCE BROKER.

PAYMENT OF MONEY INTO COURT.

See PRACTICE, 4. 12.

PENAL STATUTE.

See DISTRESS.

PENALTY.

See VENDOR AND VENDEE, 1.

PLEADING.

See BILL OF EXCHANGE, 1. BOND, 3. CORPORATION. COVENANT.

1. In declaring on a judgment signed in vacation, on certificate by the judge at Nisi Prius for immediate execution (under 1 W. 4. c. 7. s. 2.) the day of signing judgment should be stated according to the fact, and not laid as of the preceding term.

But it is enough to set out the judgment as it appears on the record; the certificate need not be stated.

The postea, however, in such a case,

case, should be so framed that the judgment may appear to be warranted by the previous finding of a jury. But when our nutt record pleaded to debt on recognizance of bail, the posted shown to the Court, proved erroneous in this respect, leave was given to amend it; the defendants also having leave to plead de novo.

Semble, that the Court would have allowed the error in the declaration to be amended without permitting the defendants to plead again. *Engleheart v. Eyre and Another, T. 3 W. 4.* Page 68

2. Declaration of Easter Term, 1831, on a replevin bond, by the assignees of the sheriff against W., the plaintiff in replevin and his sureties, after stating the condition, assigned as a breach, "that although the suit was removed into K. B. by re. fa. lo. returnable in Michaelmas Term, 1829, at the instance of W., the plaintiff in replevin, yet he did not prosecute his suit *with effect and without delay.*"

Plea, first, that by the re. fa. lo. the sheriff was commanded to record the plaint, to have the record on the return day in K. B. and to prefix the same day to the parties, that they might be ready to proceed in the said plaint; that W., the plaintiff in replevin, appeared in court at the return, and was ready to proceed in the suit, and prosecute the same with effect and without delay, but that the now plaintiffs did not appear, and the sheriff returned to the re. fa. lo., amongst other things, that he had prefixed the same day to the parties that they might be ready there to proceed in the said plaint. It then averred that W. was always ready to prosecute his plaint with effect, and without delay, and would have done so if the defendants in replevin (the now plaintiffs) had

appeared. To this plea there was a general demurrer.

The second plea stated that the sheriff, in pursuance of the re. fa. lo., recorded the plaint, returned it, prefixed the day of the return to both parties, and summoned the now plaintiffs to appear in K. B. to proceed in the plaint; and that W., the plaintiff in replevin, was ready to proceed, but the now plaintiffs did not appear. Replication, that the sheriff did not summon the now plaintiffs to appear. Rejoinder, by way of estoppel, that the sheriff, before the assignment, returned to the re. fa. lo. that he had prefixed a day to the parties that they might be ready to proceed in the plaint. General demurrer.

Held first, that a plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined.

Secondly, admitting that upon the replication to the second plea it was to be assumed that the now plaintiffs were not summoned, (and semble, that in the present action they were not estopped from alleging this,) still as it appeared by the pleas that the re. fa. lo. contained a direction in effect to summon the now plaintiffs, W., the plaintiff in replevin, was not responsible for the default of the sheriff, or guilty of delay in that suit by reason of the sheriff having neglected to serve a summons. *Harrison and Another assignees v. Wardle and Others, T. 3 W. 4.* Page 147

3. Trespass for breaking and entering two closes of the plaintiff. Plea, that the said closes in which, &c. were from time immemorial parcels of a waste, and that the defendant had a prescriptive right

of common in the waste, and entered at the times, when, &c. to use his right of common thereon; and, because the closes in which, &c. were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that *the said closes in which, &c., at the said times, were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time, when, &c., had been and were separated, and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty.* Rejoinder traversed this averment, and issue was joined thereon:

Held, that the allegation in the replication "that the said closes in which, &c. for twenty years and more, had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof, that *any part* of the closes in which the trespasses were committed had been so inclosed for that period. *Tapley v. Wainwright, T. 9 W. 4.*

Page 395

4. Declaration stated, that an iron-foundry, messuages, and cranes, boilers, and other machinery, &c., which were described, were in the possession of plaintiff's tenant, the reversion belonging to plaintiff; and that defendant, contriving to injure plaintiff in his reversionary interest, while he was such reversioner, broke and entered *the said foundries, machinery, &c. and messuages, with the appurtenances, cranes, boilers, &c.* tore up, broke down, and prostrated *the same*; seized, carried away, and converted the machinery, &c., and the cranes, boilers, &c., affixed to plaintiff's reversionary interest, and scattered and spread *the same* with rubbish, and greatly injured the said reversionary estate. Plea, not guilty.

At the trial it appeared that the plaintiff had no right to the fixtures: Held, nevertheless, that enough appeared on this declaration to support a verdict for the plaintiff for unnecessary damage done in removing the fixtures, of which proof had been given. *Hare v. Horton, W. 4 W. 4.* Page 715

5. Vendor covenanted under seal to vendee that he would, on or before the 30th of *November* then next, deduce a good title to the premises sold; and would, on or before the 8th of *January*, execute a proper conveyance for conveying the fee simple; and it was stipulated that the conveyance should be prepared by and at the expense of the vendee; and further, that if the vendor should not verify the title to the vendee or his agent, by production of deeds, &c., at *Norwich, Lynn, or London*, before the 30th of *November*, the agreement should be void.

In an action of covenant by the vendee, two breaches were assigned: first, that the vendor did not, on or before the 30th of *November*, deduce a good title; secondly, that the defendant did not, on or before the 8th of *January*, execute a proper conveyance.

Plea, first, that the vendor did, before the 30th of *November*, produce and shew divers deeds, in part deducing a good title, and that until and upon that day, he was ready and willing to produce and show to the vendee other deeds, completing such title, and would, on or before that day, have produced such deeds to the vendee or his agent attending, whereof the vendee had notice, but that he would not by himself or agent attend: Held, on special demurrer, that the plea was bad, inasmuch as the vendor's covenant was general, and therefore the facts stated were no excuse; and, that if the covenant

tenant could be read as qualified by the subsequent stipulation as to place, the plea ought to have averred notice to the vendee, at which of the three places, the vendor would be ready to produce his deeds.

Plea, secondly, to the first breach, that by a subsequent agreement made before any breach committed, the time for deducing title had been enlarged; and that the vendor was ready to deduce title within such enlarged time. Thirdly, the defendant, pleaded a similar agreement after breach, and that the plaintiff accepted such agreement as a substitution for the former, and as a satisfaction of the damages resulting from the breach; and that defendant was ready to fulfil such agreement, but plaintiff refused, &c.:

Held, on special demurrer, that the second plea was bad, in not stating the new agreement to have been under seal. Leave given to amend the third plea by stating the new agreement to have been in writing; but quare, if it were so, whether the facts amounted to a good accord and satisfaction.

Plea to the second breach of covenant, that the vendor until and on the 8th of *January*, was ready and willing to execute proper conveyances, and would have executed the same, if the plaintiff would have prepared and tendered them, but that he did not do so.

Replication, that the vendor did not deduce a good title, wherefore the vendee did not prepare the conveyances.

Rejoinder, that although the vendor within a reasonable time before the 8th of *January*, was ready and willing, and offered to deduce a good title, so that the vendee might before the 8th of *January* have prepared and tendered conveyances whereof the

vendee had notice, yet the vendee refused to have such title deduced, and discharged the defendant from deducing such title.

Surrejoinder, that the vendor was not ready and willing to deduce, &c.

On general demurrer, Held, that upon this branch, the matter pleaded by the vendee was no answer to the pleas of the vendor, and that the latter was entitled to judgment. *Rippingall v. Lloyd*, M. 4 W. 4. Page 742

6. *A.* being arrested and in custody of the sheriff at the suit of *B.*, upon a writ indorsed "oath for 76*l.*;" *A.*, in consideration of *B.* discharging *A.*, undertook to give his promissory note at six months, "for 10*o.* in the pound for the debt," on the arrival of the discharge:

Held, that this sufficiently appeared to be a promise to pay 10*o.* in the pound upon the debt for which *A.* was arrested and then in custody, and was properly declared on as such:

Held also, that the sum indorsed on the writ was sufficient evidence of the amount for which *A.* had been arrested. And that no demand of the note was necessary to enable plaintiff to commence this action. *Brown v. Dean*, M. 4 W. 4. 848

7. By a contract in writing between plaintiffs (three executors) and defendant (testator's heir at law), after reciting an agreement of all the parties, that certain goods of the testator should be sold, and that *S.*, one of the executors and plaintiffs, should receive the proceeds for and towards payment of the testator's debts; defendant agreed, that if he took possession of the said goods, he should pay to *S.* the value thereof, or give security for such payment, on or before, &c. One of the plaintiffs

and the defendant also undertook, if the proceeds of the testator's personal property should not be sufficient for payment of the debts, to raise and pay to S. a sufficient sum to enable him to discharge them. Defendant took the goods first mentioned, but did not pay for them or give security, and afterwards, finding that they were more than he wanted, he made a verbal agreement with the plaintiff, that he should select so much of the goods as he wished for, and take the same at the prices they had been appraised at, and that the residue should be taken and sold by the plaintiffs. He accordingly selected and took such goods, (being of a smaller value than those first bargained for,) but did not pay for them. Plaintiffs as executors took the residue.

Held, that supposing the action to be grounded on the written contract, S. was named therein merely as the agent of the plaintiffs, and therefore that they need not declare specially upon the contract to pay the money to him.

Semble, per *Denman C. J.* and *Parke J.*, that the second contract might be considered as substituted for the first, and forming a new and distinct ground of action. *Pearson v. Pearson*, *M. & W. 4.*

Page 859

8. After the passing of the act for the uniformity of process, *2 W. 4. c. 99.* which directs, "that all personal actions, where it is not intended to hold the defendant to bail, &c. shall be commenced by writ of summons;" an executrix pleaded, to an action of assumpsit, plene administravit, and no assets on the day of exhibiting the bill of the plaintiff. The plaintiff in his replication tendered issue in the words of the plea:

Held, that the words exhibiting the bill upon these pleadings meant

the commencement of the suit, by writ of summons and not the filing of the declaration; and therefore that evidence of payments made by the executrix between the time of suing out the writ and the filing of the declaration, was inadmissible. *Rees v. Morgan*, *H. 4. W. 4.* Page 1035

POOR CHILD.

See SETTLEMENT BY APPRENTICE-

SHIP.

POOR RATE.

See INCLOSURE ACT, 2.

By a grant of G. 1. reciting that the *Chelsea Water Works Company* had undertaken works for supplying *Westminster*, &c. with water, and had petitioned the crown for liberty to use a certain canal or basin and old pond in *St. James's park*, and to lay mains through the park to and from the same for the purpose aforesaid; and that the surveyor general had reported that the said undertaking might be convenient to his majesty, and to many of his subjects, and ornamental to the park; the King gave, granted and assigned to the company and their successors the said canal, &c. to be converted into reservoirs and to be used and enjoyed by them as such, for the purposes aforesaid, during the royal pleasure. Liberty was also granted them to break up the ground at all times through the said park, for laying therein pipes or mains to and from the old pond and canal for the purposes aforesaid, making good the ground so broken as soon as possible. Certain conditions were added, prescribing the direction in which the pipes should be carried, the breadth of ground to be

be broken, &c. The company were to supply *St. James's* palace at reasonable rates; and the ranger was empowered to supervise all the company's works in the park and order them to rectify and reform the same if not done according to the conditions.

The company took the basin and pond in pursuance of the warrant, and made a reservoir, into which they conveyed water, and laid pipes communicating with it for the purposes aforesaid. They subsequently made expensive improvements in and about the reservoir, on the requisition of the crown; and they were never allowed to alter or repair it but by leave, and under the inspection of the crown surveyor. They pay no rent and are paid for supplying the palace, as well as other residences. The ranger is rated to the poor for the herbage growing on the surface of the soil in the park, including that under which the pipes pass:

Held, first, that the company were rateable as occupiers of the reservoir; secondly, that they were rateable for the occupation of land below the surface of the soil by their pipes, though another person was rated for the herbage. *The King v. The Governor and Company of the Chelsea Water Works*, *T. 3 W. 4.* Page 156

POSTEA.

See PLEADING, 1.

POWER.

See LEASE, 2, 5.

POWER OF ATTORNEY.

See COPYRIGHT, 5.

PRACTICE.

See INDICTMENT, 1. NEW TRIAL.

1. Sections 87, 88, of the first General Rule of *Hilary* term 2 *W. 4.* relating to the discharge of prisoners in the custody of the marshal of the *King's Bench* and warden of the *Fleet*, who are supersedeable, apply only to persons within the walls of the respective prisons. *Siggers v. Brett, Clark*, *T. 3 W. 4.* Page 455

2. The Uniformity of Process Act, 2 *W. 4. c. 39.* Sched. No. 4., repeals sect. 24. of the first General Rule of *Hilary* term 2 *W. 4.*; and, therefore, if a party held to bail on a *capias* do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail bond in suit. *Hilary v. Rowles and Two Others*, *T. 3 W. 4.* 460

3. The 7 & 8 *G. 4. c. 30, s. 41.*, which directs that actions brought for any thing done in pursuance of that statute, shall be tried in the county where the fact was committed, applies only to the case of parties exercising particular powers conferred by the statute.

In an action against justices for falsely imprisoning the plaintiff on a charge of feloniously beginning to demolish a house, contrary to the act, the Court granted a rule to change the venue, on a suggestion that a fair trial could not be had in the county. *Thomas, Gent. v. Saunders and Another*, *T. 3 W. 4.* 462

4. Payment of money into court on a count on a promissory note payable by instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note; it does

addition to the Statute of Limitations, 1838, as to a further sum claimed 1838 on the same note. *Reid and Another, Executors v. Dickens, M. 4 W. 4.* Page 499

8. Where a new trial is granted on payment of costs, in a town cause, the costs occasioned by the cause being made a remanet are included. *Robinson v. Day, M. 4 W. 4.* 814

6. After the Uniformity of Process Act, 2 W. 4. c. 39, the Court directed the signer of *K. B.* writes to sign a pluries bill of *Middlesex*, in a suit commenced before the act, and which, if recommenced, would have been barred by the Statute of Limitations. *Finnie v. Montague, M. 4 W. 4.* 877

7. Defendant in an action for words, after notice of trial, signed a paper, in which, after requiring that plaintiff had consented on defendant's paying the costs, and making an apology, to stay proceedings, he made such apology. Held, that this was a positive undertaking by defendant to pay the costs.

Plaintiff in such a case having stayed proceedings, but defendant not paying the costs, the Court will enforce performance of the agreement on his part by rule. *Tardieu v. Brook, M. 4 W. 4.* 880

8. On application to the Court by a sheriff under sect. 6. of the Interpleader Act, a third party served with the rule, and not appearing, is barred by sect. 3. from further prosecuting any claim brought in question by the rule, as well as where such application is made by a defendant under sect. 1.

The Court, on such application, will, on proper grounds shewn, order the sheriff, or the execution creditor, to pay to a third party appearing and successfully prosecuting his claim, his costs of such appearance. *Ford v. Dilley, M. 4 W. 4.* 885

9. Issue was entered in a cause in *Buster* term, 1827, and docketed according to the practice of the office of judgments. The plaintiff in 1828 recovered damages and costs, and entered final judgment on the roll, but the judgment, according to a practice said to have prevailed for 100 years, was not docketed as required by 4 & 5 W. and M. c. 20 s. 2. On application to the Court in *Hilary* term 1834, to order the judgment to be docketed *nunc pro tunc*: Held, that the Court had no power to make such order. *Hopwood v. Watts, H. 4 W. 4.* Page 1056

10. In a cause decided by the judge of an inferior court on a writ of trial, this Court will hear a motion for a new trial on the ground that the verdict was against evidence, though the damages were below 20*l.* *Taylor v. Mills, H. 4 W. 4.* 1069

11. A motion calling upon an attorney to answer matters alleged against him on affidavit affecting his character, must be made by a barrister. *Pitt Ex parte, H. 4 W. 4.* 1078

12. The rule of Court *Hil. T. 2 & 3 G. 4.* requiring that on all bailable mesne process, the defendant's place of abode and addition shall be indorsed, is in effect repealed by stat. 2 W. 4. c. 39. and therefore the want of such indorsement is no objection to a *capias* issued under that statute, and in the body of which the defendant is described as "G. P. of the city of London."

An affidavit to hold to bail for a debt stated therein to be due to A. and B. is good, though the plaintiffs are partners, and are not stated to be so in the affidavit. *Bodfield v. Padmore, H. 4 W. 4.* 1095

13. Defendant in a cause, being advised to pay 48*l.* into court, gave his attorney 50*l.* for the purpose of making such payment, which was done. The attorney afterwards

PRACTICE.

wards delivered his bill to the client, not including the 40*l*., and on taxation more than one-sixth was taken off. The attorney then claimed to add the 48*l*. (which would have made the deduction less than one-sixth), stating that the item had been inadvertently omitted.

Quere, whether such item was chargeable as a disbursement by the attorney; but

Held, that, at all events, the attorney, not having treated it as a disbursement in making out his bill, could not claim to insert it as such, for the purposes of the taxation. *Hayes v. Ivimey*, *H. 4 W. 4*.

Page 1106

PREMIUM.

See *LIABILITIES*, 3.

PRINCIPAL AND AGENT.

See *BANKER*, 2.

PRISONER.

See *ARREST*, 2.

PRIVILEGED COMMUNICATION.

See *EVIDENCE*, 3.

PROHIBITION.

1. The act 1 *W. 4*, c. 21. "to improve the proceedings in prohibition," does not enable this Court, where a party has declared in prohibition and succeeded, to grant him his costs incurred in the Ecclesiastical Court. *Tessimond v. Yardley*, *T. 3 W. 4*. 458

2. A prohibition cannot issue to a court martial, after its sentence has been ratified by the King and

QUO WARRANTO. 1122

carried into execution. In the matter of *John Waller Fox*, *M. 4 W. 4*. Page 681

PROMISSORY NOTE.

See *PLEADING*, 6. *PRACTICE*, 4. *STAMP*, 2.

PROMOTION. 438

QUO WARRANTO.

A quo warranto information was moved for against an officer elected by ballot, on the ground that a large proportion of the persons who voted were not qualified; but it was not shown for whom the votes of those persons were given:

Held, that on this application the officer could not be required to prove his election valid, but it lay on the opposing parties to show (if that were practicable) that his majority was obtained by bad votes. *The King v. Jefferson*, *M. 4 W. 4*. 855

RATE.

See *INCLOSURE ACT*, 2.

RECOGNIZANCE.

See *JUSTICES*, 3.

REGULÆ GENERALES. 1.

467, 468. 816. 1—2211

REMAINDER.

See *DEVISE*, 4.

REMANET.

See *PRACTICE*, 5.

RENT

RENT APPORTIONMENT OF

See LEASE, 2.

REPLEVIN BOND.

See PLEADING, 2.

ROAD.

See HIGHWAY, 1, 2. TOLL.

SESSIONS.

See MANDAMUS, 3, 4, 7, 9.

Where it has been referred to the chairman at sessions, on an appeal, to state a case, and a case has afterwards, on certiorari, been returned to this Court by the clerk of the peace, purporting to be signed by the chairman, this Court will not send it back to be re-stated, or quash the certiorari, on the ground of the chairman having said that he did not recollect signing the case, and upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, and that deponent believes the chairman did not settle the case. *Rez. v. The Inhabitants of Matlock, M. & W. 4.*

Page 883

SET OFF.

See ATTORNEY, 1.

SETTLEMENT — by Apprenticeship.

See STAMP, 3, 4.

1. A person of the age of twenty-one years, is not a *poor child* whom the parish officers are to bind out apprentice with the assent of two

justices within the meaning of the 56 G. 3. c. 139. Section 11 of that statute extends only to indentures of apprenticeship of *poor children*; and, therefore, an indenture whereby a person of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two justices. *The King v. The Inhabitants of St. John Bedwardine, T. 3 W. 4.* Page 169

2. Pauper was bound apprentice for seven years to a breeches-maker, and served his master half a year: the latter then failed in business, and told the pauper he might go and work for one B., who lived in another parish, and if pauper did not become troublesome to him, the first master, or to his parish, till the end of his time, he would give pauper his watch. The pauper agreed with B., and worked for him at breeches-making, by the piece, at the usual rate. B. frequently carried messages between the first master and the pauper. The latter having worked for B. a year in B.'s parish, agreed (with the consent of his first master) to work by the piece for C. another breeches-maker, living in a third parish, who gave better terms. While he so worked with C., his first master came to see him, and again promised him his watch at the end of his time. The pauper worked two years for C., living in C.'s parish; he afterwards left, and his first master then sent him his watch. The pauper kept his earnings, and maintained himself:

Held by *Denman C. J., Little-dale, J., and Patteson, J.* (*Parke J.* dissentiente), that the inhabitation of the pauper in the parishes of the second and third master was connected with the apprenticeship, and that he thereby gained settlements

ments in those parishes. *The King v. The Inhabitants of Banbury*, T. 3 W. 4. Page 176
 8. On special case, the sessions found that *J. E.* by indenture in 1774, was put apprentice to *P.* for and in respect of *W.*'s estate; and there was a covenant by *P.* to teach *J. E.* the business of husbandry. The indenture was executed by the parish officers and *W. P.* was a farmer, and tenant to *W.*, who was a stocking-weaver. *J. E.* never served *P.*, but lived with *W.* long enough to gain a settlement by apprenticeship, if he could acquire one by such service. The sessions not having found that *P.* ever executed the indenture, or assigned the apprentice to, or assented to his service with *W.*, it was held that a settlement by apprenticeship was not proved. *The King v. The Inhabitants of St. Guthbert Wells*, 4 W. 4. 939

SETTLEMENT — by Birth.

Appellants against an order of removal, to establish a birth settlement proved, first, the marriage of the father and mother at *K.*, in April 1749; and, secondly, the baptism at *K.* of their four children, viz. a daughter *M.*, in May 1751; a son *J.*, in May 1753; a daughter *E.*, in January 1755; and another daughter *S.*, in December 1756;

Held that the sessions were not bound to infer from this evidence that *E.* was born at *K.* *The King v. The Inhabitants of Lubbenham*, H. 4 W. 4. 968

SETTLEMENT — by Estate.

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the

order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish; and, therefore, upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may show by parol order evidence that the first order of removal was quashed on the ground that the pauper resided on a tenement of his own, which made him *inremovable*, though it did not confer a settlement, and that he afterwards sold the tenement, and thereby became removable. *The King v. The Inhabitants of Wick St. Lawrence*, M. 4 W. 4. Page 526

SETTLEMENT — by Hiring and Service.

1. Pauper was hired for a year as a footman and groom, by a West India planter residing at *M.* in England at 7l. wages. He went into the master's service in February, 1828, and in May following engaged to bind himself to serve the same master at *Berbice* as clerk and overseer, for three years from the first day of his arrival there, at a certain salary. Soon after their arrival at *Berbice*, the pauper entered on the office of overseer and clerk, but he also continued to act as servant, and lived in his master's house, and did so until the following February, when they returned to England, the pauper acting in the capacity of servant on the homeward voyage, and after his arrival in England. No further contract had ever been entered into for the pauper's service as overseer. The master paid him his footman's wages till the time of their going abroad,

abroad, and on their return home paid him 20*l.* as salary for the service in *Berbice*, after which he gave him weekly wages under a new agreement:

Held, that there was no dissolution of the first contract, and that the pauper having served forty days under the first hiring, gained a settlement in *M. The King v. The Inhabitants of Buckingham, H. 4 W. 4.* Page 953

2. A female of full age, who lived with her father and was the main support of his family, hired herself with his consent, and at his desire, to a farmer in an adjoining parish to work at weekly wages during his harvest; she worked for him under this hiring for three weeks, when she received her wages and returned home. In the following autumn she again hired herself to the same farmer, and served him for a fortnight and two days; and on her return home she gave her wages to her father, who expended them for the use of his family. On both these occasions she intended, and was expected by her father, to return home as soon as the harvest work was done. The court of quarter sessions having upon these facts found that the pauper was emancipated, held by *Denman C. J., Taunton and Patterson, Js. (Littledale J. dissentiente)*, that their decision was right. *The King v. The Inhabitants of Oulton, H. 4 W. 4.* 958

3. Pauper on the 16th of May, 1811, being in the local militia, hired himself to the colonel of his regiment to serve for a year, and served under that contract. On the 4th of May, 1812, the regiment was assembled for training, and continued in training till the 19th of May. During that time the pauper was under military control, though he also served

the colonel as an in-door servant. While the regiment was assembled he received pay from the crown, and also his wages from his master:

Held, that the pauper gained a settlement by hiring and service; the fact of his being a militia man having been known to the master at the time of the hiring. *The King v. The Inhabitants of St. Mary at the Walls, Colchester, H. 4 W. 4.* Page 1023

SETTLEMENT -- by renting a Tenement.

1. A. rented a house in the appellant parish of *L.* as tenant from year to year and died. His widow, a fortnight after his death, told the landlord that she wished to pay the rent weekly; he assented, and she paid it weekly for the following nine months when she quitted on a week's notice. Two months after her husband's death the attorney for the respondent parish (which had relieved the widow) told her she had a right to take out administration if she chose, and if she would leave it to him, he would do whatever was necessary. She assented, the letters of administration were obtained, and the pauper resided forty days afterwards in the appellant parish. The sessions found that the administration was fraudulently taken out by the direction and at the expence of the respondent parish, for the purpose of settling the pauper in the appellant parish:

Held, that as the widow was not only entitled, but bound by law, to take out administration, there was no fraud in the transaction which could prevent her from taking, as administratrix, her husband's interest as yearly tenant, and thereby acquiring a settlement. But the court referred it back to the sessions

sessions as a question of fact, whether the widow after administration granted, continued a weekly tenant, or became a tenant from year to year, in her husband's right. *The King against The Inhabitants of Great Glenn*, T. 3 W. 4. Page 188

2. The first section of the statute 1 W. 4. c. 18. which enacts, "that from and after the passing of that act, no person shall acquire a settlement by reason of the yearly hiring of a dwelling-house, building, &c. unless the rent for the same to the amount of 10*l*. at the least shall be paid by the person hiring the same," is prospective only. *The King v. The Inhabitants of Ruthin*, T. 3 W. 4. 215
3. To give a settlement by renting a tenement, since the stat. 1 W. 4. c. 18. there must be an *occupation in fact* of the whole dwelling-house or building of which the tenement consists, *by the party hiring the same*; and, therefore, where A. took a lease for a year of a house consisting of three floors, at the rent of 40*l*. per annum, and after he had been in possession three months underlet two floors by the quarter, at the rate of 22*l*. per annum, to another person who occupied them for two quarters, the ground floor only during that time being occupied by A. and in all other respects the provisions of the 6 G. 4. c. 57. and 1 W. 4. c. 18. were complied with, it was Held, that A. did not gain a settlement. *The King v. The Inhabitants of St. Nicholas, Rochester*, T. 3 W. 4. 219
4. A curate licensed by the bishop at a yearly salary according to the 57 G. 3. c. 99. resided in the rectory house which was assigned to him pursuant to the same statute, and was above the value of 10*l*. a year, for more than forty days before the passing of the 59 G. 3.

c. 50.: Held that this was a *coming to settle* within the statute 13 & 14 Car. 2. c. 12., and that a settlement was gained thereby. *The King v. The Inhabitants of St. Mary, Newington*, M. 4 W. 4. Page 540

5. A. by lease demised a house and land to B. and C. for a term of years at 16*l*. per annum. There was a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent. B. occupied the whole premises, and paid the rent for five years: Held, that, the demise being joint, the rent was payable by the two jointly and that each could only be considered as having rented a tenement at 8*l*. a year, and consequently that B. did not gain a settlement, either by renting the tenement, or by being rated and paying rates in respect of it. *The King v. The Inhabitants of Great Wakering*, H. 4 W. 4. 971

SETTLEMENT ~~---~~ by serving an Office.

In a parish governed by a select vestry, public notice was given that the vestry would meet to elect an organist for a newly erected chapel. At the meeting C. S. was elected, and it was entered in the minutes of vestry, that she was appointed organist at 80*l*. per annum. She performed the office for several years, receiving the salary half yearly, and residing in the parish, till, on complaint made against her by the congregation, she was dismissed by order of vestry:

Held, that the office of organist so held by C. S., was not a public annual office, by which a settlement could be gained under 3 W. & M. c. 11. s. 6. *The King v. The*

The Inhabitants of St. George, Hanover Square, M. 4 W. 4, Page 571

W. SHERIFF'S OFFICER.

See ARREST. 1.

SLANDER.

1. Declaration stated that defendant intending to cause it to be believed that plaintiff *had been guilty of wilfully setting his house and premises on fire*, said of the plaintiff that he *had set fire to his own premises*, meaning that he *had been guilty of wilfully setting fire to the premises*, which, while in his occupation, had been destroyed by fire. After verdict for the plaintiff, the judgment was arrested on the ground that wilfully setting his own premises on fire was not, except under special circumstances, a crime punishable by law; and the Court would presume only such circumstances as it was essentially necessary for the plaintiff to have proved in support of his declaration. *Sweetapple v. Jones, T. 3 W. 4.* 27

2. Declaration in slander. The second count stated that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her, as such, the following words: "She (meaning the plaintiff) secreted in 6d. under the till; stating, these are not times to be robbed." The declaration alleged as special damage, that one S., by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held, that the words in the second count, if actionable at all, were so only by reason of the special damage, and therefore that the plaintiff, if entitled to recover, ought to have full costs:

Held, secondly, on motion in arrest of judgment, that the words

STAMP.

in that count were not defamatory in their nature, and therefore not actionable, even though followed by special damage. *Kelly v. Partridge, M. 4 W. 4.* Page 645

SPECIAL CASE.

See Sessions.

SPECIAL DAMAGE.

See SLANDER, 2.

STAMP.

1. In the Stamp Act 65 G. 3. c. 184. Schedule part 1. (title Bill of Exchange), which imposes a certain duty on bills "exceeding two months after date;" the date means the time expressed on the face of the bill, not the time when it actually issued. And although by section 12. if a bill purporting to be payable at two months from a certain time, be issued before the commencement of that period, without payment of a proportionate duty, the maker is liable to a penalty; yet a bill so post-dated, and bearing the inferior stamp, corresponding with the purport of the bill, is admissible in evidence, being on the face of it, conformable to the schedule. *Williams v. Jarrett, T. 3 W. 4.* 32

2. A promissory note payable to A. B. generally, is not one payable to bearer on demand, and re-issuable, within the first class of notes described in 55 G. 3. c. 184. Sched. part 1., but, a note payable otherwise than to bearer on demand (not re-issuable), within class 2, and therefore such a note for 100l. requires a stamp of 3s. 6d. only. *Cheatham and Wife v. Butler, M. 4 W. 4.* 337

3. Where an instrument is not required

STAMP.

quired by law to be stamped within a particular time after its execution, the Court on its being offered in evidence will not inquire when the stamp was affixed, nor if a penalty was incurred, whether the proper penalty was paid on the stamping. An indenture of apprenticeship, without premium, was executed *April 27th, 1825*, but not stamped till *July, 1832*, when a *1l.* stamp was put on it, and a *3l.* penalty paid. Afterwards a double duty (*2l.*) was paid. The indenture was offered in evidence to prove the settlement of a pauper by service under it: Held, that as it was not within the stat. 8 *Anne, c. 9.*, which limits the time for stamping indentures, the Court was not called upon to notice the circumstances under which the stamps were affixed. *The King v. The Inhabitants of Preston, H. 4 W. 4.* Page 1028

4. The 55 *G. 3. c. 184.* does not repeal the provision of the 8 *Anne, c. 9.* as to the time for stamping indentures of apprenticeship, and therefore an indenture of apprenticeship (a premium having been paid with the apprentice), must be stamped with the ad valorem duty, within the time prescribed by the stat. 8 *Anne, c. 9. s. 36, 37, 38.* and if not so stamped is wholly void. *Rev v. The Inhabitants of Church Hulme; E. 1831.*

1029

5. The son of *J. S.* having been arrested, one *W.* becoming his bail, *J. S.* signed an agreement to indemnify *W.* from all liability which he might incur in consequence of having so become bail: Held, that one of the liabilities to which *J. S.* thereby subjected himself, was to pay the debt for which the son of *J. S.* had been arrested, and as that must have amounted to 20*l.*, the subject matter of the agreement

STOPPAGE IN TRANSITU. lxi

must have been of that value, and therefore required a stamp within the 55 *G. 3. c. 184. Sched. part. 1. Wrigley v. Smith; the elder, H. 4 W. 4.* Page 1117

STATUTE OF LIMITATIONS.

See PRACTICE, 4.

STEAM ENGINE.

See BANKRUPT, 1.

STET PROCESSUS.

See PARTNERSHIP, 1.

STEWARDS, POWER OF, TO ADMIT TENANT.

See COPYHOLD, 3.

STOPPAGE IN TRANSITU.

1. *D.* bought of *Y.* 46 puncheons of rum lying in the warehouse of *Y.* at *Liverpool*, and sold them to *C.* who was a clerk of *Y.*, but carried on business for himself. *D.* gave *C.* an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum and the samples which had been taken remained in *Y.*'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at *Liverpool* is by the vendor's giving a delivery order to the vendee. *D.* was asked by *C.* for delivery orders, but declined giving any, except for two or three puncheons which *C.* received. *C.* marked, coopered and gauged the casks. While the bills were running, *C.* sold twenty-six of the puncheons to *K.* who paid him for them, and who by *C.*'s permission without

without the knowledge of *D.*, engaged and coopered the casks in the warehouse of *Y.* and marked them with his initials. *C.* gave an invoice to *K.* stating the marks and numbers of the casks and by whom the rum was bonded. *C.* also while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices and samples, and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by *D.* They paid *C.* for the whole. The bills given by *C.* for the price of the forty-four puncheons were dishonoured: Held upon special case (whereby it was agreed that the Court should be at liberty to draw from the facts any inference that the jury might have drawn) that *C.* never had acquired the actual possession of the rum, and on his dishonouring his acceptances, *D.* had a lien on it for the price; and that *C.*'s subvendees could not claim against *D.* the rum which remained undelivered to them. *Dixon and Another v. Yates and others*, 7. 3. W. 4. Page 213

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.*

paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court: Held that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession, was then vested in *H.*, the indorsee of the bill of lading for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied; but that in a court of equity, such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*

Held, secondly, that *W.* by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *H.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to the payment of the debt; and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *In the matter of Westminster and Others*, M. & W. 4.

Page 817

SURRENDER.

See CORYHOLD, 3. 5.

TAXATION OF ATTORNEYS BILL.

See ATTORNEY, 1. 2.

TOLL.

TURNPIKE ACT.

TOLL.

Where certain roads were, by local acts, placed under the direction of trustees for amending, improving, and repairing the same, and the trustees were empowered to erect turnpike gates on the said roads, and receive tolls there; but there was a certain portion of one of the said roads, which they were prohibited from repairing or improving, and on which they were not to erect toll-gates:

Held, that a person travelling along the last-mentioned road for more than a hundred yards including the excepted part, but less if that part were excluded, was not exempted from toll by 3 G. 4. c. 126. s. 32. *Pope v. Langworthy*, T. 3 W. 4. Page 464

TRESPASS.

See PLEADING, 3, 4.

TROVER.

See LIEN.

TRUSTEES.

See CANAL ACT, 2. HIGHWAY, 1. INSURANCE BROKER.

TURNPIKE ACT.

See HIGHWAY, 2. MANDAMUS, 2. TOLL.

A local turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings; and that all persons should have access to such entries. By a subsequent local act it was directed, that the trustees should

VOL. V.

keep a book, in which they should enter their accounts, which book should be open to the inspection of the trustees, or of any creditor on the tolls. The general turnpike act, 3 G. 4. c. 126. s. 75, re-enacted the latter provision as to all turnpike road accounts; and s. 72 directed that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where, by that act, it is otherwise ordered.

Held, that these clauses of the general and of the second local act, superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors in the respective cases of orders and accounts. *The King v. The Trustees of the North Leach and Witney Roads*, H. 4 W. 4. Page 978

UMPIRE.

See ARBITRAMENT, 2.

UNIFORMITY OF PROCESS ACT.

See PLEADING, 8. PRACTICE, 2, 6.

VALUED POLICY.

See INSURANCE, I.

VARIANCE.

See BILL OF EXCHANGE, 1. PLEADING, 6, 7.

VENDOR AND VENDEE.

See ACTION ON THE CASE, 2.
FRAUDS, STATUTE OF. PLEADING.
5. STOPPAGE IN TRANSITU, 1, 2.

1. By the 36 G. 3. c. 88., entitled "An Act to prevent Abuses and Frauds in the Packing, Weight, and Sale of butter," (s. 2.) every cooper, or other person making a vessel for packing butter, is required to brand his Christian and surname on such vessel, together with the exact weight, or tare thereof, or in default thereof he is to forfeit for every such vessel not so marked 10s. By section 3. every dairyman, farmer, &c., who shall pack any butter for sale shall pack the same in vessels so made and marked as aforesaid, and shall brand his Christian and surname on different parts of the vessel therein described and on the butter contained in such vessel, upon penalty of forfeiting for every default 5s.

In an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to the defendant, it appeared that the firkins were not marked according to the act:

Held that the provisions which required the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked; that the subject matter of this contract was in such a state from the vessels not being properly marked, that the sale of it was forbidden by act of parliament; and consequently that the contract of sale was void, and the plaintiff could not recover:

Held further, that although there was a penalty imposed in

the same clause of the act, which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty; but that the clause might be used against him as a defence to an action. *Foster v. Taylor*, M. 4 W. 4. Page 887

2. In every contract for the sale of an existing lease, there is an implied undertaking by the seller (if the contrary be not expressed,) to make out the lessor's title to demise, and without shewing such title, the seller cannot maintain an action at law against the buyer, for refusing to complete the purchase.

Where a lessee in possession contracted to sell the residue of his term, being three years and a quarter, at the rent of 42l. per annum the vendee paying 30l. for the fixtures as per list: Held, that it was not to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease, that the vendee intended to waive his right to call for the production of the lessor's title. *Sotter v. Drake*, H. 4 W. 4.

992

VENUE.

See INDICTMENT, 1. PRACTICE, 3.

VOLUNTARY PAYMENT.

See BANKRUPT, 2.

WAGES, ACTION FOR.

See MASTER AND SERVANT, 1, 2.

WAIVER.

See LEASE, 6.

WAR.

WARRANT OF ATTORNEY.

See JUDGMENT.

WASTE.

See COPYHOLD, 4.

WATER FLOWING, RIGHT TO.

See ACTION ON THE CASE, 1.

WAY.

Two coheirresses being seised each of an undivided moiety of two estates conveyed to *H.* in fee, for the purpose of making partition, one of the estates called *Parkhall* to which they were entitled by descent as coparceners, and another called *Woodseaves* of which they were tenants in tail, together with all houses, outhouses, edifices, orchards, ways, paths, passages, rights, members and appurtenances whatsoever to the said several messuages; tenements, lands, and hereditaments belonging or therewith usually held or occupied, to hold *Parkhall* to *H.* in fee to certain uses, and *Woodseaves* to *H.* in fee to the use of *H.* and his heirs, to make him a tenant to the præcipe, in order to suffer a common recovery. The deed contained a covenant to levy a fine of the moiety of one of the coheirresses in *Parkhall*, and a declaration that a recovery should be

suffered of *Woodseaves*, and then declared the uses of the fine, recovery and conveyance as to the whole of the said messuage or tenement called *Parkhall*, with the buildings, lands, hereditaments, and appurtenances thereto respectively belonging, to be to such uses as the husband of the said coheirress should appoint; and as to *Woodseaves* with the buildings, lands, hereditaments, and appurtenances thereunto belonging, to the use of the other coheirress in fee. The fine was levied and the recovery suffered:

Held, that a way from the king's highway over the *Woodseaves* estate to the *Parkhall* estate, which before the conveyance, fine, and recovery, had always been used by the occupiers of *Parkhall*, did not pass by this deed of partition, fine, and recovery, to the owner of *Parkhall*. *Plant v. James and Another, M. 4 W. 4.*

Page 791

WITNESS.

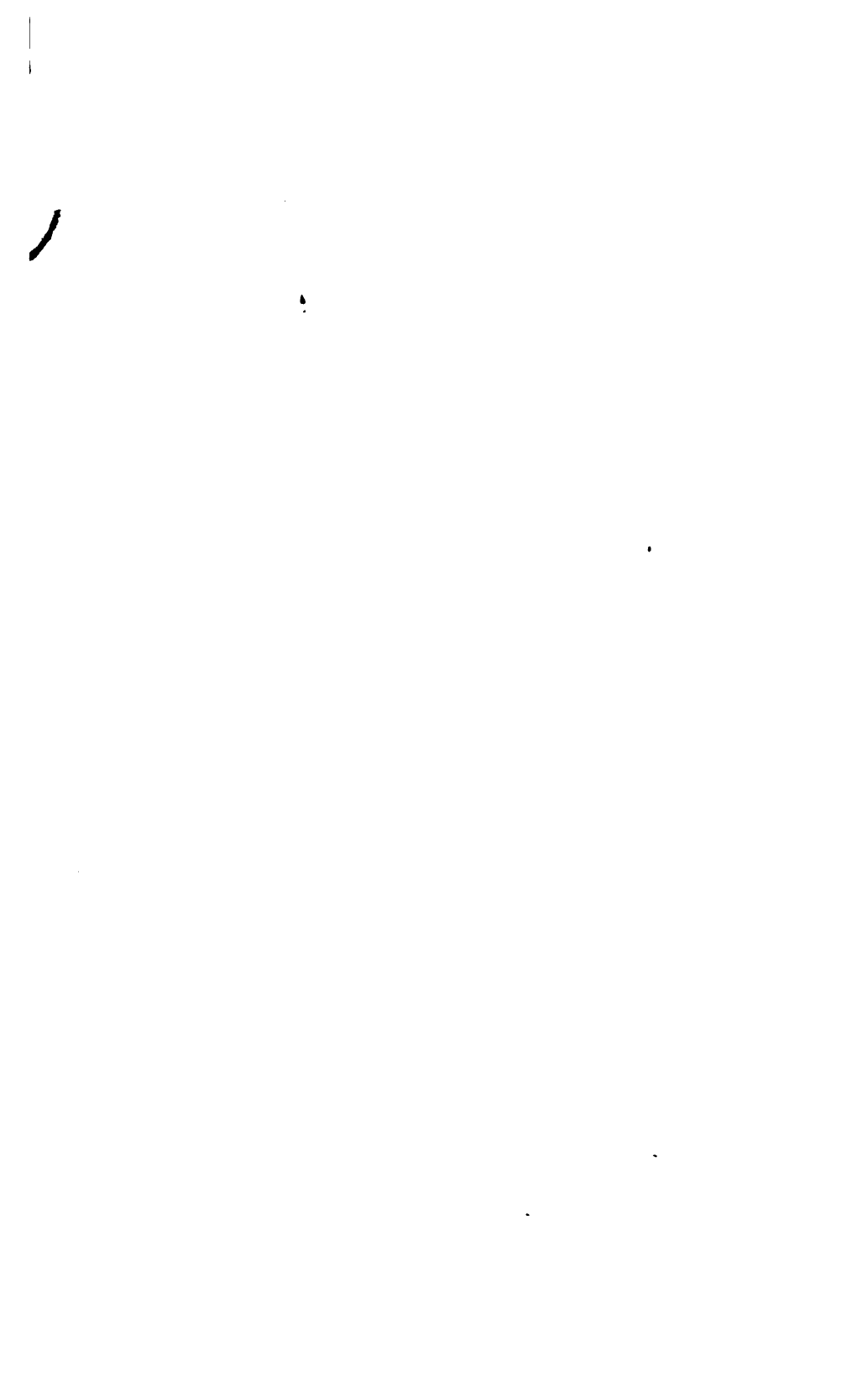
See EVIDENCE, 2, 3.WORDS, CONSTRUCTION OF,
AFTER VERDICT.*See* SLANDER, 1, 2.

YEARLY HIRING.

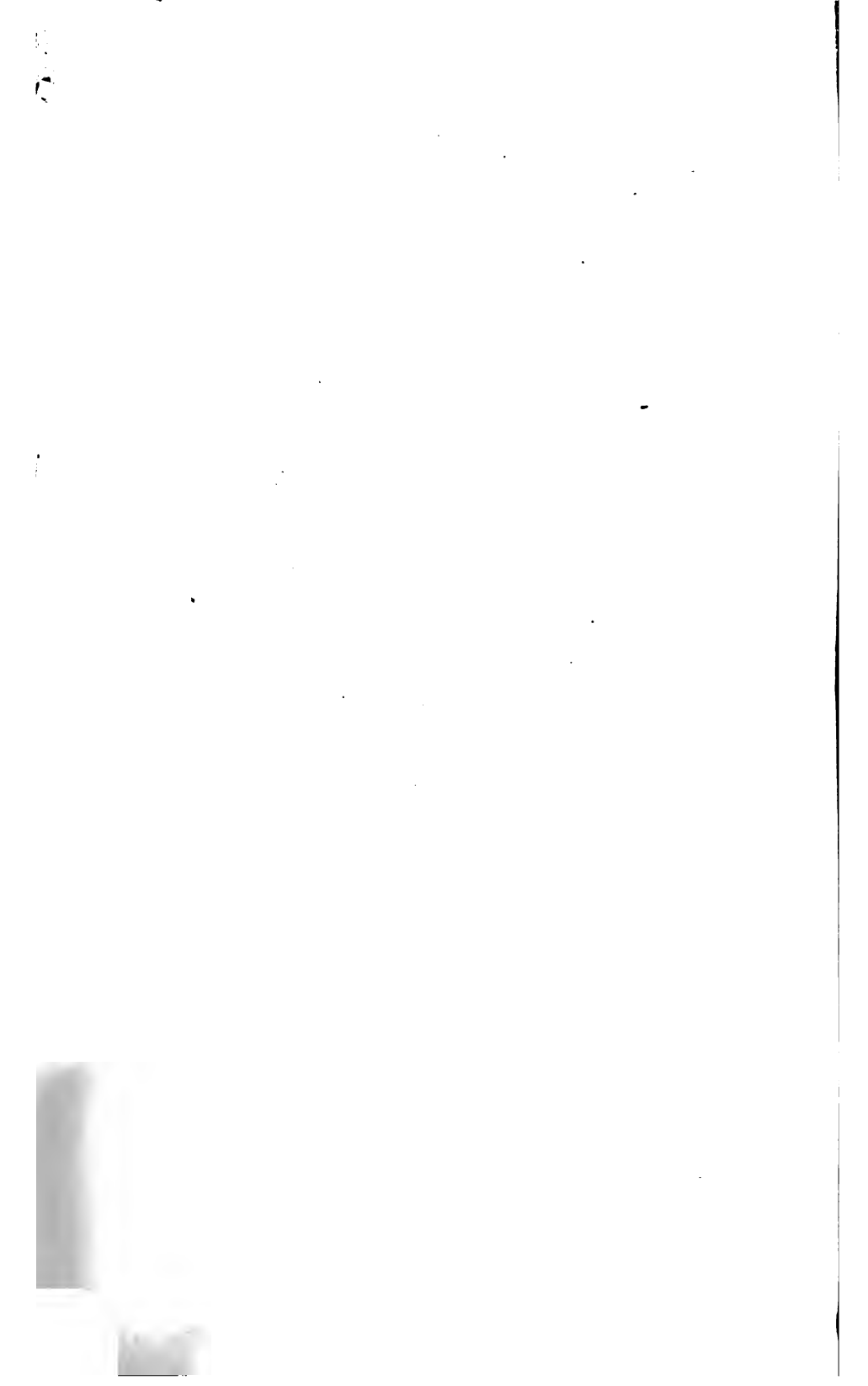
See MASTER AND SERVANT, 1, 2.

LONDON :
Printed by A. SPOTTISWOODE,
New-Street-Square.

7







Standard Law Library



3 6105 062 786 897

